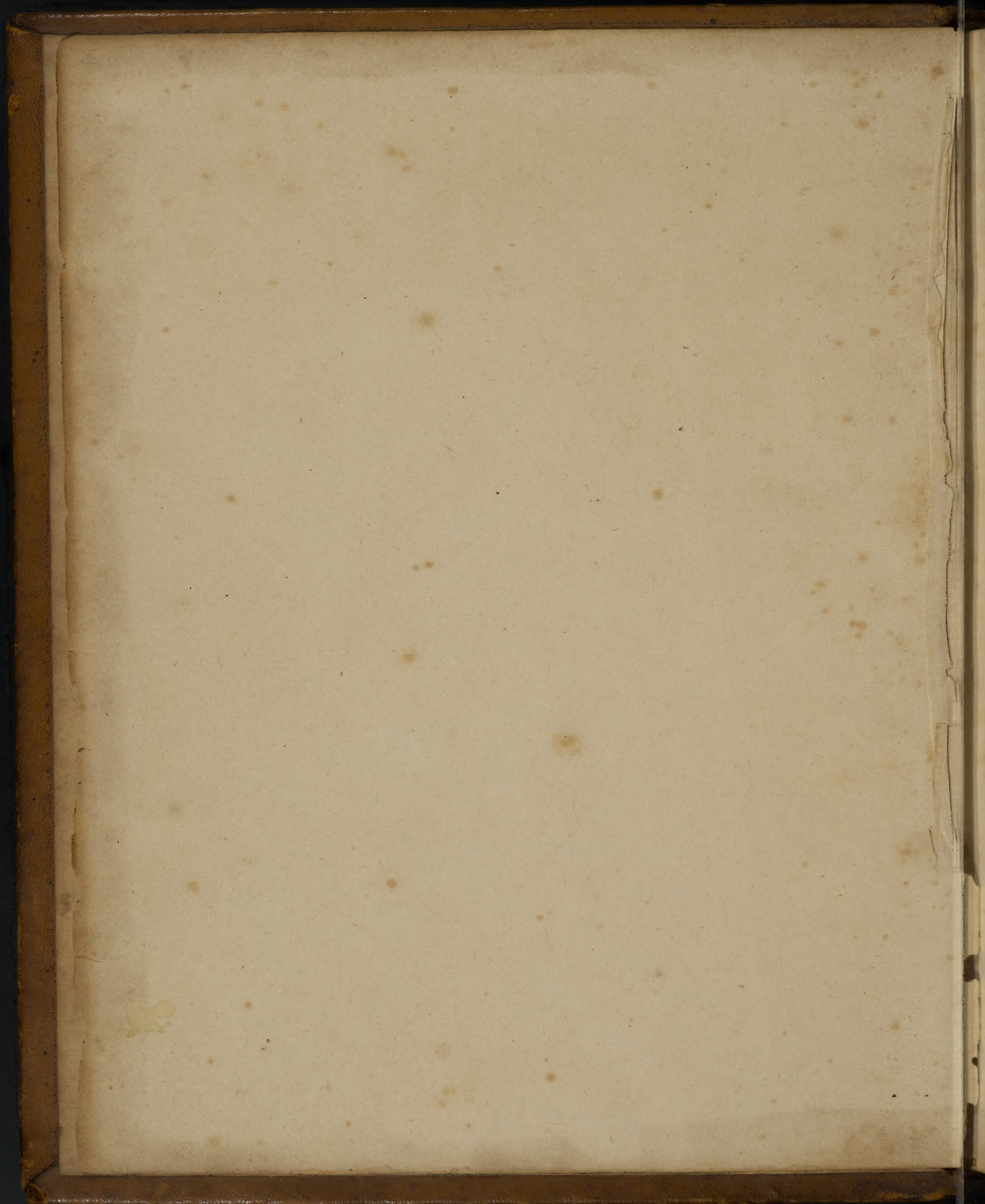
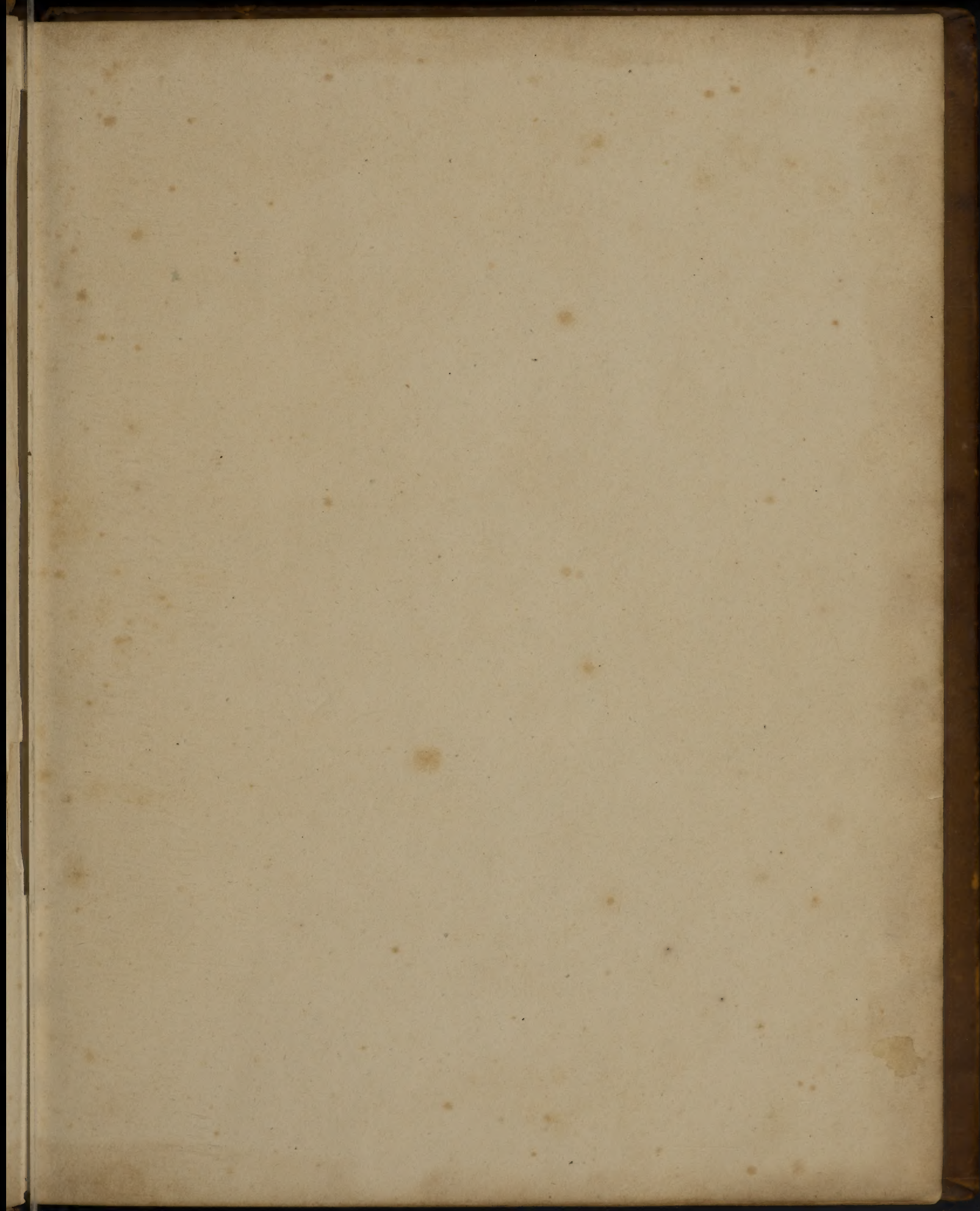
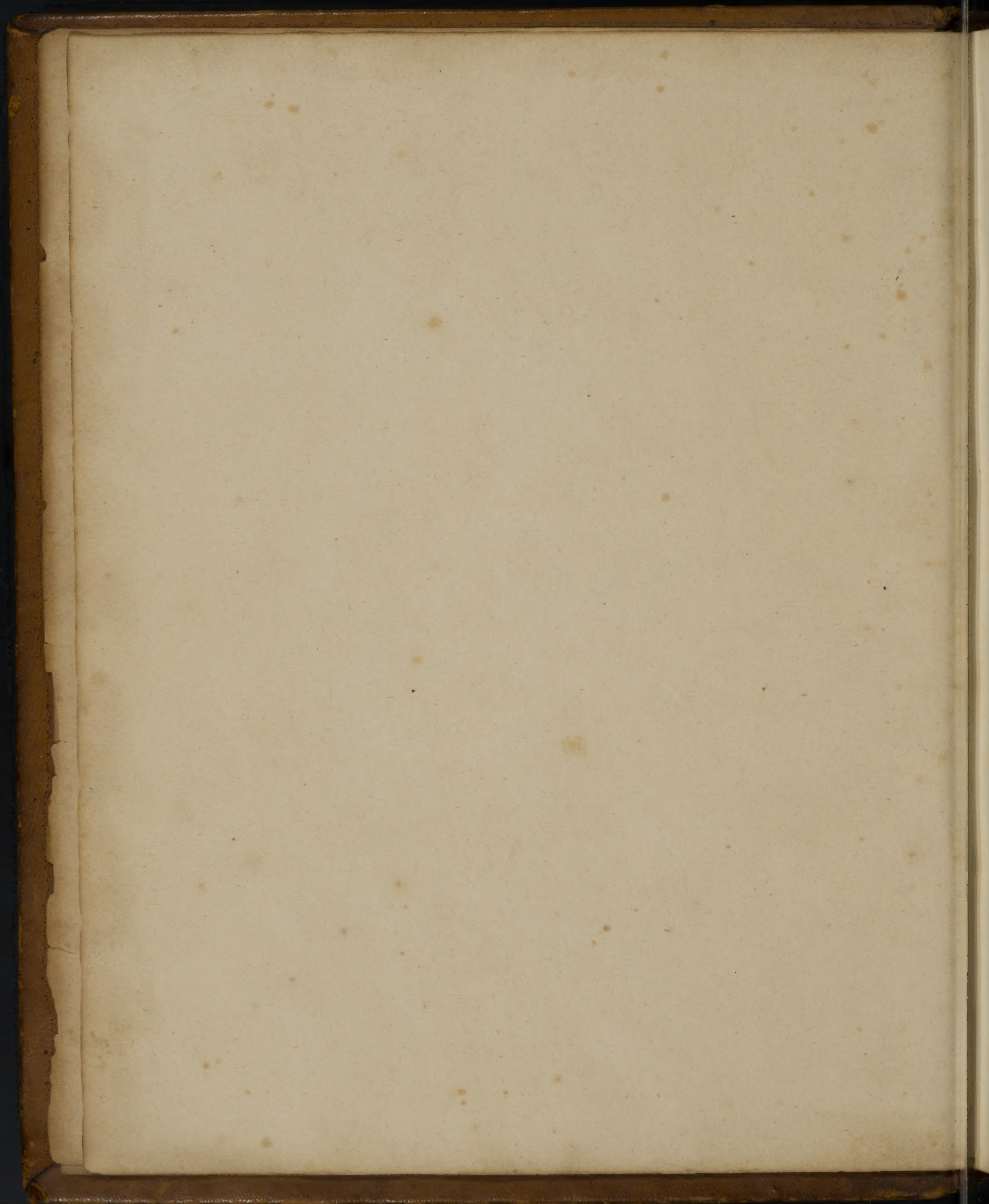


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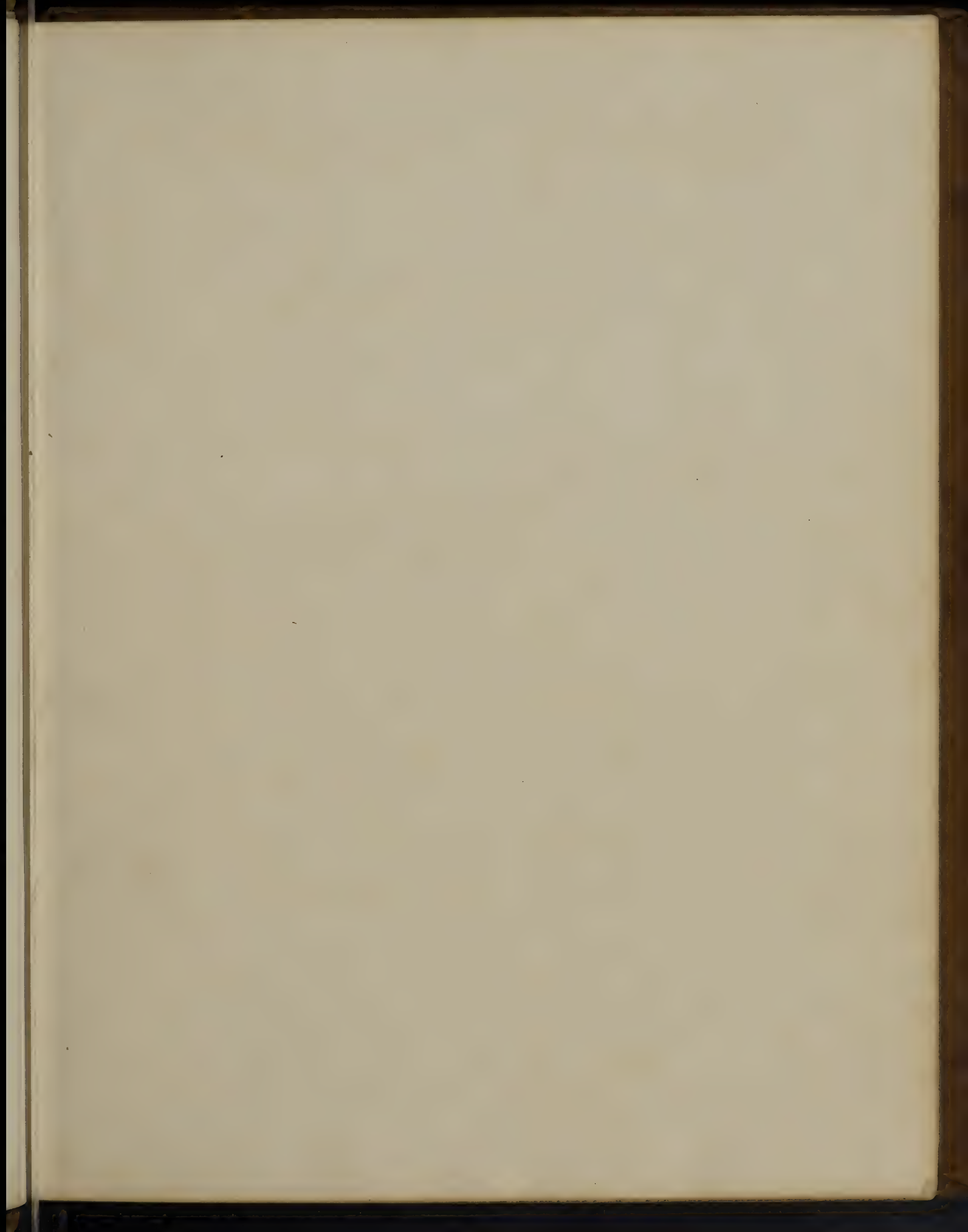
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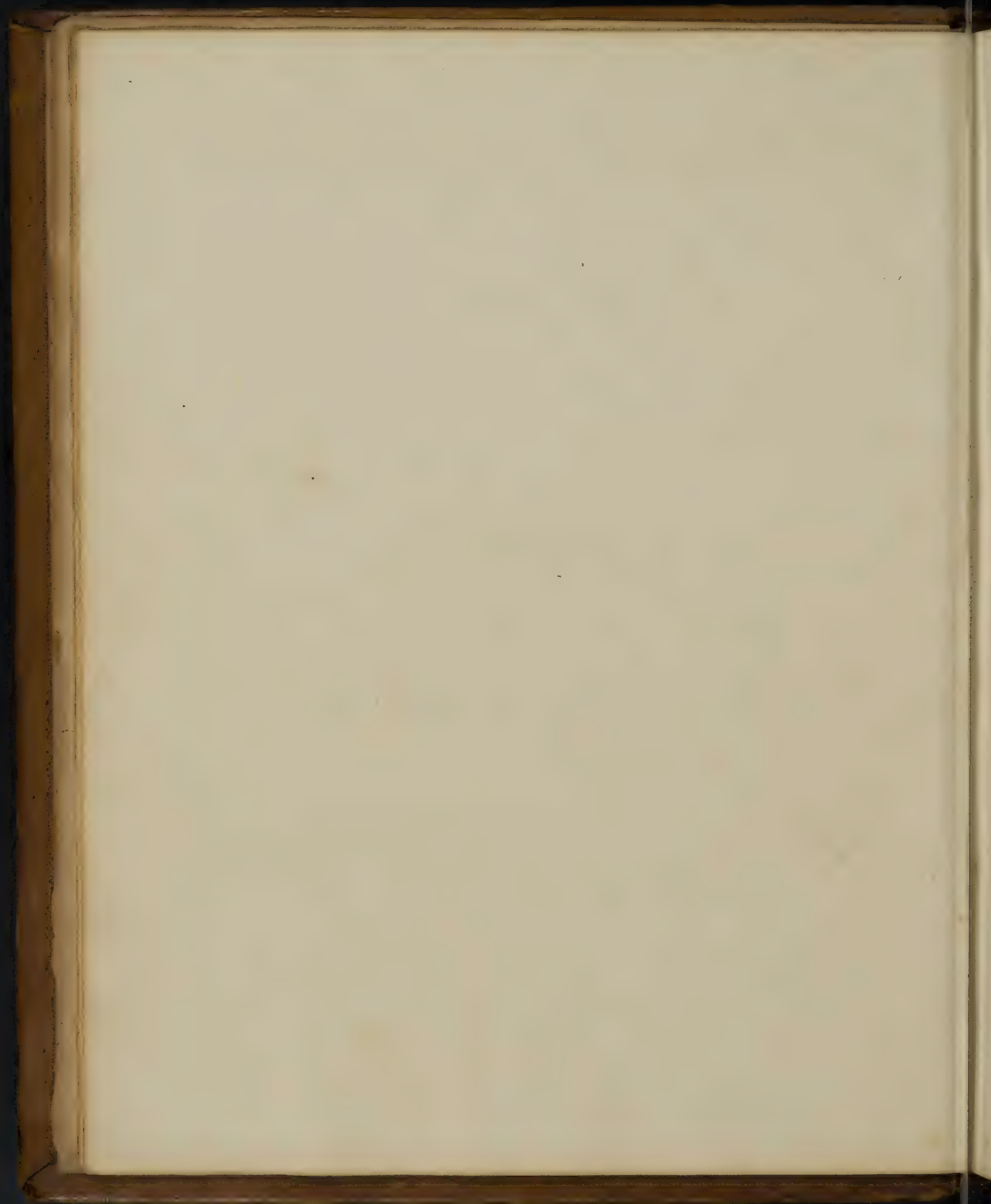
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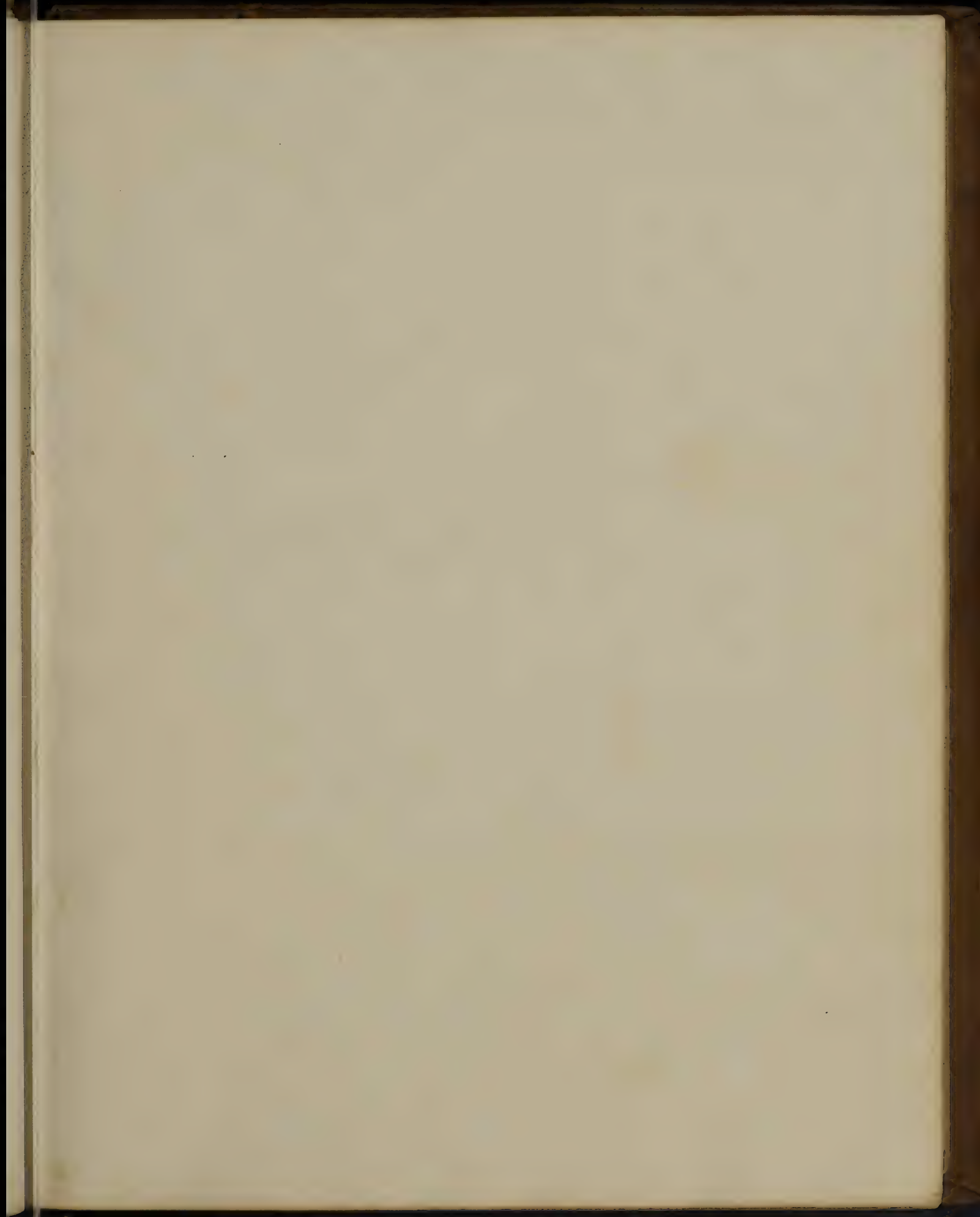
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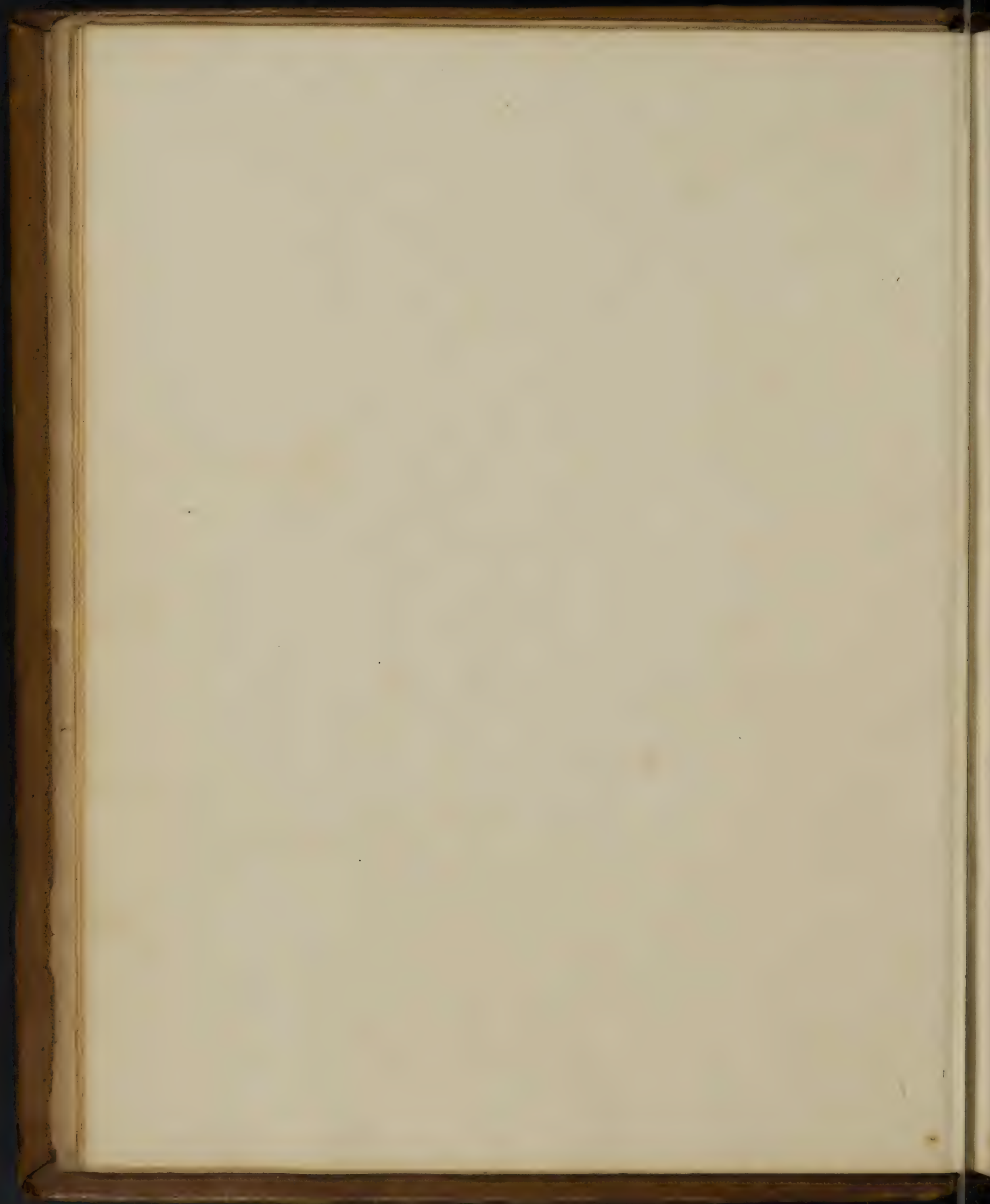
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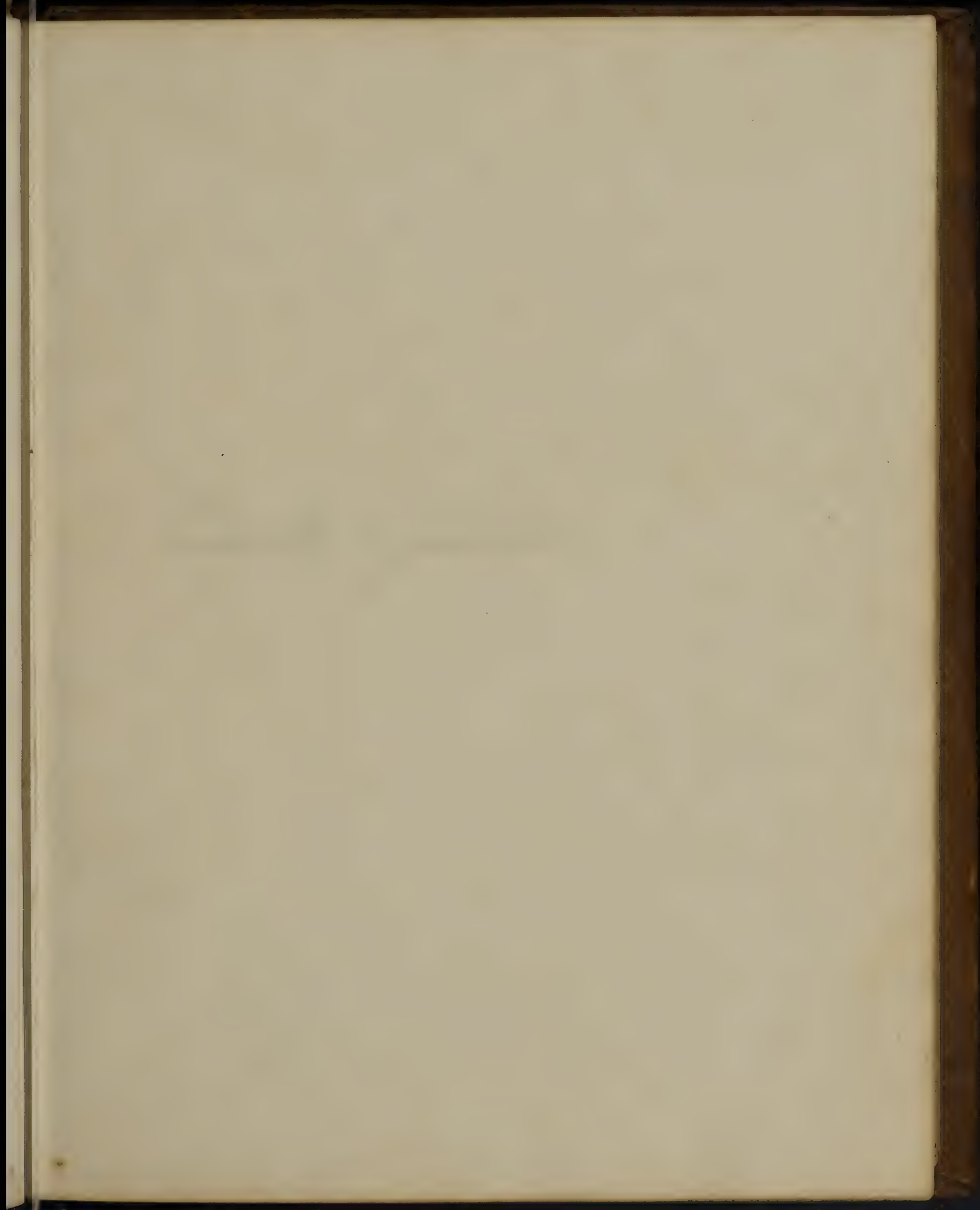
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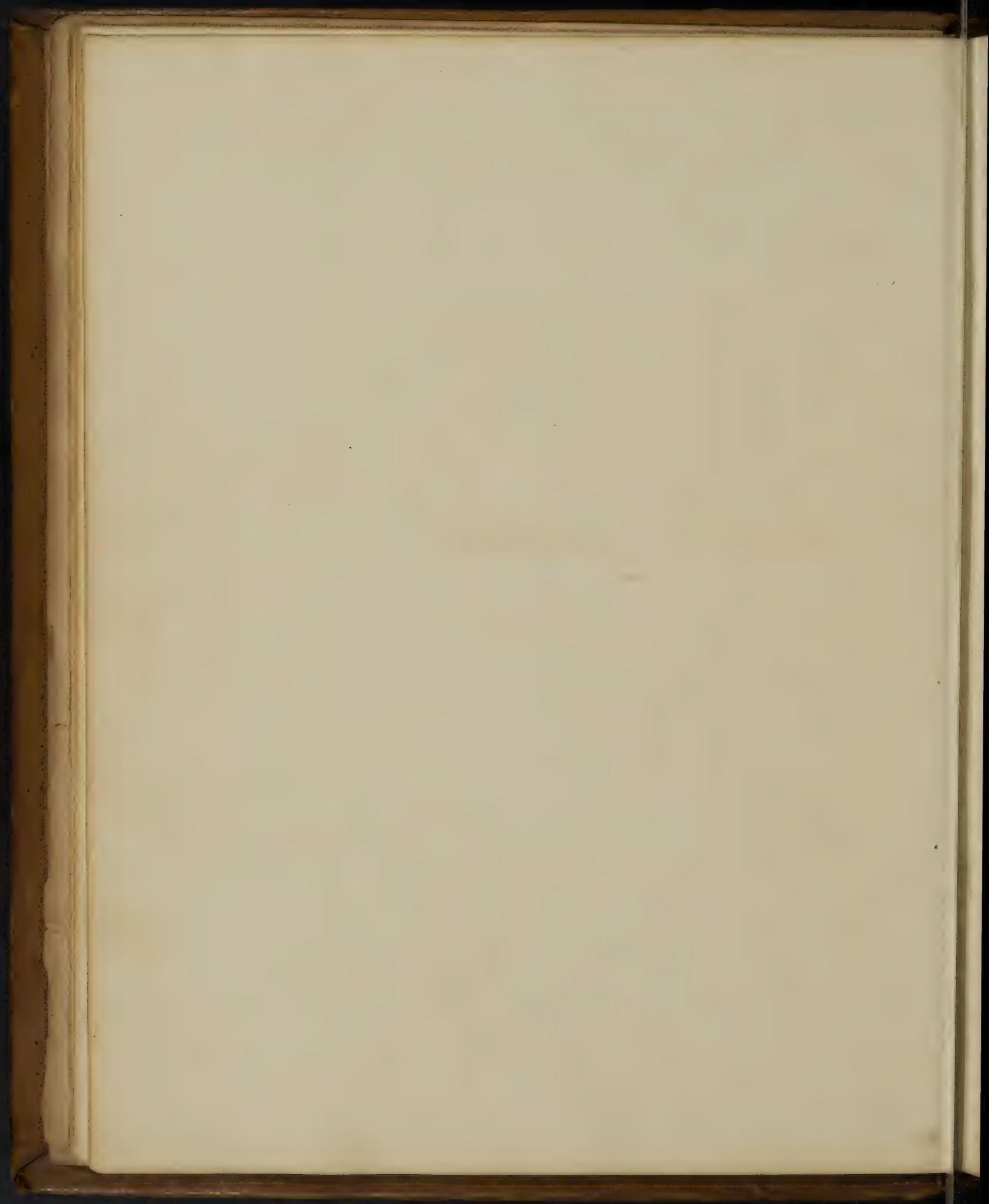












Sheriffs and Sailors



Sheriffs and Jailors.

64,
Gaule Esq^r 1812.

1st As to the nature of a Sheriff's Office and the manner of their appointment, -

The word "Sheriff" is derived from two. 4 Bar^d 130.
Saxon words. Signifying, the Governor or Keeper 1 Bar^d 337.
of a County. Thine or power. at O S the Sheriff (D^r) 343.
was the first officer in the County.

Sheriffs in England were formerly elected by the "people" of the County - but now are appointed by the King, from three persons nominated by the two Judges 1 Bar^d 340.

By Stat. 23 Henry 6 and 4 Edward 3. he holds his Office for one year only, and yet it is said before what authority I don't know, that he may be appointed "during good pleasure" - and indeed such is the form of the Writ or Commission by which he holds his appointment.

So Coun^{ty} the Sheriffs are appointed by the Governor and Council, and they hold their Office during the pleasure of their appointers. Their Office determines therefore only

on their death, resignation, or removal.
In Court there is appointed one for each County,
and in England they have just but one. & in
Ireland they have two. they are called A and B.
Sheriff of such a County.

It is the duty of the Sheriff to reside in the
County for which he is appointed, and he can do
any original official act out of it, but he may
go out of his County if it is necessary to Court-
execute an official act regularly. Commanded in,
his own. If for instance an Habeas Corpus
issues to the Sheriff of A to bring a Prisoner
into the County of B, he may do it.
So if he has settled a group of Attachment on prop-
erty in his County, and to complete service it is
necessary to go into another County, to leave a copy
with the Justices or at his last place of abode - for
there are only Executions of official acts Com-
manded in his own jurisdiction.

So if a Prisoner escapes into another County,
the Sheriff may pursue and retake him, for
this is only a furtherance of his local authority; -

The Sheriff as a ministerial officer may at
Hob^d 13 C. 2 appoint "Deputies" or "Under Sheriffs". Who
may execute all the ordinary ministerial offi-
ces of Sheriff and his most important duties as a
ministerial officer. But -

But the Sheriff's judicial authority can be suspended by Deputy.

But by a late Stat. a Sheriff can now appoint a Genl Deputy without the sanction of the County Court. But he may appoint a Special Deputy, without the sanction of that Court.

So the Sheriff of different Counties may appoint each other Deputies without such approbation. Deputies are not by law sworn in the Counties of their Sheriff.

As the Deputy is the servant of the Sheriff it follows that he may remove his Deputy from office at pleasure. Yet while he remains in office his Genl power as Deputy can be abridged even with his own consent. If therefore the Deputy enters into a Bond, not to perform certain duties, or not to execute process beyond a certain amount such bond is void.

Under our Law also the Ct of Com. Pleas may in certain cases send, suspend or remove a Deputy from acting.

But by Com. Law the discharged Com can be only by the Sheriff.

In England the Deputy acts only officially in the name of the Sheriff, and not in his own name.

mean that the Constable voluntarily aid or that
the Constable commands aid, or assistance, for this
he may do, & send persons assisting with him
in an official capacity, this is also shown in 5th ed 211,
the "Modern" that an arrest by a Justice of
the Peace is not good, but by this is meant - over-
sight by the assistant of the Deputy when he is
absent.

If a Sheriff directs a Warrant to two,
or more persons either of them alone may ex- 117.
ecute it - for it is a rule of Municipal Law 1st 81
that when an authority of a public nature 181
is conferred upon two or more persons, this
authority is several as well as joint - otherwise 442, +
where the authority is of a private nature - 1st page 30.

If the Deputy is guilty of any neglect of
duty the Sheriff may have an action against him
immediately, either an action on the Case,
or if there was a bond of indemnity an action 1st 98
on the Bond. The reason of this is that the
Sheriff is liable, or answerable over to the De- page 37, 39
ree injured by such neglect - the Law raises 1st 132
an implied promise on the part of the Deputy
that he will do his duty faithfully.

The Sheriff is "ex officio" superior of the 4th 34
Common Jail in his own County the Jailor. 1st 119
then who acts under the Sheriff is the Servant 1st 122,
and,

57
an agent of the Sheriff and appointed and re-
moved by him at pleasure.

As keeper of the Jail the Sheriff has the
Hobbs' 202 Custody of all who are committed to prison and
Litch 10, it is his duty to confine all persons who,
18 of 318 are not admitted to bail in the Common Jail
+ 5th 171 in his County, but the Court cannot send them in
+ Salt, 408 any other Jail which is not a common one
The Court cannot convert a house or a Shop into one
"pro re nata", in such case he would be liable
for false imprisonment.

But in case of an emergency as if the jail
be burnt the Sheriff may for a time con-
fine them elsewhere.

The Sheriff being keeper of the Jail it fol-
lows of course that the Court be warranted for any
civil process, for it is absurd to say that a
keeper can imprison himself, if he were im-
prisoned he might immediately set himself
out, for he alone has the custody of the keys.
No man is liable to an arrest who is not li-
able to be imprisoned. Of course the Court be
holden to bail for this is a consequence of an
arrest. It has been said that the process
Hobbs 48, shall abate, in case he is arrested by a Con-
ceive that this is not correct, for it ought to
have -

have been proceeded with in the same manner as if it had been a Summons. for the Sheriff is liable to be summoned. - If the Court be imprisoned he must undoubtedly be discharged but I see no reason why the Court should not proceed. - In analogous Cases "Noy" where a Female Court is arrested she may upon Caution Bail be discharged. So in England in Case a Peer of the Realm is arrested, he must be discharged - but in both Cases the action is not proceeded.

The question is what is to be done in Criminal Cases. I know of no definite rule on this subject but I suppose he must be imprisoned in the adjoining County "ex necessitate rei" - for this is the only mode of bringing him to trial 22 Bar. 239 viz by arrest. But in Civil Cases he can be 40 Stiles 405 held to trial by Summons. - In Yorkshire - one of the same Principle it is admitted that the Sheriff's Wife Can be imprisoned in any Civil Case. Hence it follows that if a Sheriff maimed a Female Prisoner he is guilty of an escape.

Liability of the Sheriff for the acts and defaults of his Deputies.

The Deputy being of Coke 98 the Servant of the Sheriff, the acts of the for 30 80 are all regularly the acts of the latter, according to 138

Neuf, 314 to the well known maxim, "qui facit per
 alium facit per se" I mean the official
 acts of the Deputy.

Since it is that the Sheriff
 is allowed to take security from his Deputy.
 Siles, 18 for a faithful discharge of his duty. And
 + 4 Bac 441 how is only for the Sheriff's own security. For
 a similar bond to any other person would
 be void.

As to the extent of the Sheriff's liability,
 the rule is that all the official acts of the
 23 Ray 1754 Deputy, being as to all civil purposes the acts
 of the Sheriff. The Sheriff is liable civilly, but
 18 Mod 238 not criminally. For its by fiction of Law
 + Cro Jac 330 that the acts of the Deputy are the acts of the
 Darg 42 Sheriff; but the Law now makes one a
 25 Feb 184 criminal by fiction, at C & D to subject a per-
 + Salub 187 son to punishment for a crime he must have
 been actually guilty of the offence. —

But for the Private Fines, which Deputy
 Phill 94 not committed when acting officially, the Sheriff
 Cro Eliz 175 is not liable, and the reason is that these
 1 Decr 140 Private Fines are not official acts, and Conse-
 quently, not the acts of the Sheriff, he is in such
 case a stranger not only in fact but in
 contemplation of Law.

It has therefore been made a question
 whether —

whether, if a Deputy, arrives and Et.^m agt A upon
the Goods of B. the Shff. is liable or not in
Fretcraft to B. & it is said by some that the
Sherriff is not liable (who the Deputy is) be-
cause he does not act in pursuance of the
authority vested in him, by the Sherriff.

4th ed 402.
Mills 309,
2d ed 832,
Dang 42
P. 422.

But it seems to be now well settled by mod-
ern decisions that the Sherriff is liable in such
case. He must he does not follow the direc-
tions, given him. But it is just as between the
Shff. and the innocent person, that the Shff.
should suffer for choosing so unskillful or faithless
a Deputy.

Now a mere neglect of duty, in the
Deputy, the Sherriff only is liable at C. Law
the named Sherriff is not liable for neglect of
duty, so any one but the Sherriff. But to him
he is liable whether there is any good given
or not. So if he neglects to execute a writ pro-
cess or suffers an escape, the Shff. only is
liable, the reason is that the Deputy is not at
C. Law known as a public officer, and it cannot
appear upon the face of the writ that the
Deputy has neglected anything which it was his
duty to perform.

5 Coke 89
Cowp 403,
D. 406?
Lath 182
Kelle 94
2d ed 243,
Esp. 503.

It would remark that what is here called
"breach of duty" - means neglect of duty, otherwise
you cannot reconcile the Cases; what is the Case

in.

in "Cov. for." 2d Mansfield says it does not
 that the Deputy is not liable for breach of duty
 in himself, - but which he must have meant from
 which result from neglect.
 1 Leon. 145. As to for causes Tort Committed by the Deputy
 Cro Eliz 173 he as well as the Sheriff is liable, and an
 action may be brought against either The Sheriff.
 2 Mod 321 is liable on the ground of its being the act of
 his servant and the Deputy as a Tort-feasor.
 3 Levin 258
 Cro Eliz 230
 2 Mod 321

Upon that distinction great confusion is
 found in the Books. but no contradiction.

The Sheriff who appoints a Special Deputy
 is liable in the same manner as where he
 appoints a Gen. Deputy. But if the Sheriff
 designates any particular person and request
 the Sheriff to appoint him in this case the
 Sheriff would not be liable to the Deputy. -

But if the Deputy has sustained any par-
 ticular loss by such appointment he may have
 an action against the Sheriff.

The rules of Bond Law are all of them Law in
 Comm. except the distinction which relates to neg-
 ligent and Torts Committed by a Deputy. In (Tort)
 a Deputy is liable as well for neglect as for Torts
 and he is liable immediately, the party injured
 may sue either him or the Sheriff. He is liable
 for neglect in the same way now as he is in
 England for Torts. for he is here known as a

practitioner

Public Officer, the writ is directed to him and he returns it. it appears from the face of the writ that he has been guilty of a breach of duty. Latham 3^d

It is a rule that if after the death of the Sheriff and before the appointment of a successor a prisoner escapes, no one is liable for the jail. 3 Coke 72
his authority ceases on the death of the Sheriff there is no such case as other persons than a 1 Mod^o 14
recapitulation.

If a Sheriff having begun execution is removed from office he must still proceed and complete it for the execution of process is Lath 333
an entire thing. So if a Sheriff becomes mad or Croft 73
goes to it and before the time of sale is removed Holt 893
still he must proceed and complete the sale D^o 894
of the property - and so under our Law Courts - Moore 557
even where the office regularly expires annually -
must finish the execution of a process com-
menced by them.

I will now consider more particularly
The authority and duty of Sheriffs. &c

By the C. of England the Sheriff acts both in a ministerial and judicial Capacity, and Hobbes 343
in his judicial Capacity he holds Courts for
many purposes. -

In Cornwall and Devon and Suff
in all the States the Sheriff has no judi-
cial authority he acts only in a ministerial
and

and executive Capacity,

There is a remarkable distinction between a ministerial and executive Officer. viz. The Executive Officer is one whose duty it is to execute the Law independent of any authority, derived from a Superior.

A Ministerial Officer, is one whose duty it is to execute the Law in obedience to a Superior Officer, and to act in obedience to that Officer.

So a Sheriff as Conservator of the Peace is an executive Officer but in making an arrest or executing process, acting in obedience to the commands of the Court. He is a ministerial Officer. By virtue of his Office and of his own authority he must keep the peace. But when he serves a process he executes it in obedience to another.

1st As keeper of the Peace, the Sheriff is ^{Black. 343} the first Officer in the County at C. D. & he ^{Black. 387} is the first County Officer and our Stat. Laws on this Subject must find as the first executive Officer in the County.

By virtue of his executive authority the ^{Black. 343} Sheriff may at C. D. apprehend and imprison a ^{1 A. 1. 1887} person who breaks the peace, or who may be brought to do so, and in England by virtue of his judicial authority he may bind them to keep the peace. not so here. The Sheriff.

The Sheriff is bound as an executive Officer to take all Traitors Felons, Murderers, &c. and keep them in safe Custody, and he may defend the Justs of the County ag^t public enemies, and as a consequence of this authority he may command the "posse Comitatus," he may order the County to assist him, and in this "posse Comitatus," are included all male persons above the age of 15 years except at 21 years of the realm.

The Constable is a Stat^e giving the Sheriff ^{Mem^o 384} specified authority which is not materially different from that vested in him by the C Law, he is by this Stat^e to suppress all riots, routs tumultuous assemblies, &c. to prevent all breaches of the peace and in pursuance of these powers he may apprehend without Warrant. He may likewise command the assistance of all suitable persons. The Constitution of this word "suitable persons" would I suppose be all males over 15 agreeable to the rule of C Law.

33^d our Stat^e the same authority is extended to Constables within their Towns & the Sheriff in ^{Mem^o 384} their Counties.

The Sheriff considered as a Ministerial Officer. - It is in this Character that his rights and duties are most frequently called in question. - As a ministerial Officer he is bound

14
 344. bound to execute all legal process regularly
 74. directed to him, and for refusal he is liable
 60. at C. L. to fine and imprisonment and also to
 the party injured. But by this is not meant
 385. that he is in all cases to execute process for
 sickness, temporary absence, or previous engage-
 ment will excuse him.

501 The Constable or Sheriff is liable to an action
 440 on the Case for not returning a Writ. But
 333 in England he is not liable to such action
 58. for not returning it. But a different process
 200. issues against him in such case, viz. a writ of
 291. attachment.

385 By our Law he is bound to give
 a receipt for every Writ delivered to him if the
 party requires it. and if he refuses the persons
 present may be called as Writs to the return
 on, and this shall answer the same purpose
 as a receipt. The same is the Law respecting
 Constables. This provision is seldom carried
 into effect in mesne process but only in Cases
 of Writs of Execution and final process where
 it is always done.

A known Officer as Sheriff Deputy, Con-
 stable &c. is not bound to show his Writ before
 99. he arrests the person of the Writ or takes his
 485. goods even if the Writ remains to be shown and
 the reason is

the reason is that every one is presumed to know C. P. D. 504
a public officer, and it is his duty to submit 85 Rep. 187
to any process executed by such officer. But
even a public officer must make known the
cause of arrest after the arrest is made by read-
ing it to him, or in some other way, and this
he should do immediately after making the
arrest.

But on the other hand, a Sheriff's Deputy
or Sheriff's Bailiff must show his Writ before
he makes the arrest, he or she may properly if the
Deft. demands it and if he refuses to show his
Writ, the Deft. may lawfully resist him, and
the reason is because he is not known as an of-
ficer - but if not demanded, he may lawfully
make an arrest before showing up.

Authorities
I agree

It has been said that the Sheriff in his
executive capacity might command the
"good Cornibales" for the purpose of tak- 2 Just. 193
ing Traitors, Felons, Murderers &c. He may 20 - 453,
also, in his ministerial capacity command 46 Bac. 4253,
the power of the County when vested in the
execution of any lawful process, and his
Deputy has the same authority.

There is a provision in our Stat. the
necessity of which I cannot see for the Com,
Said Court the same authority. It is pro-

It is provided in our Stat. that in any great opposition to legal arrest, or the execution of any the Sheriff may with the advice and consent of an assistant or Justice of the Peace call out to his assistance any number of the Militia. And he has this power at Com. Law without the consent of a Justice of the Peace. And the Stat. further provides that he shall not return that he cannot execute process. —

The manner in which a Sheriff may execute process. — It is a settled rule that he cannot break an outer door or Window of any Dwelling — house for the purpose of arresting the owner or taking his goods on a Civil process, and the reason is that every mans house is his Castle (a relic of feudal baronage), but there is no propriety in this reason, and no reason in the rule, for a man ought not by taking his door to be safe from to evade the process or execution of the Law, but the rule is so settled. —

It is said in some of the old Books, as 5 Co. 92, Bacon &c — that if a Sheriff acts contrary to this rule and breaks an outer Door or Window the execution of the process will be good, tho' the Sheriff will be liable as Trespasser — but now being to take decisions, this seems not to be Law. 2. R. 2. 823. and it is absurd to suppose that the execution

of a process by illegal means is itself legal! -

The practice is used for the Ct. to discharge the Debt on motion, which evidently shows that the execution is not good. - The Ct. will not however sustain always discharge the Debt on motion it is discretionary with them.

Our Books do not well explain what amounts to a breaking. But I consider that not only forcible breaking, but the removing of any kind of fastening is a breaking within the meaning of the rule, as the lifting a latch or Window. This is in case of Burglary and I see no reason why it should not be in this case, -

But this privilege of Castle is now confined strictly, for it extends only to outer doors and Windows. It follows then that if the Officer can enter peacefully he may break open an inner door, &c. &c. - But even this he may not do wantonly, without having first demanded admittance.

This privilege of mansion house extends only to the owner his Family, and Goods. - If therefore a Sheriff has a process against a person who is in B's house. he may break open the house to arrest it - he ought however first to demand admittance. The rule is the same if A's Goods are in B's house. -

A's privilege -

Again Privilege of Castle is allowed as a^g -
 5 Coke 91 Civil process only, and not ag^t Criminal
 4 Bac 454 in any Case for offer or demand of coloured
 and refused. the Sheriff may break open an
 outer door. &c - in a Criminal Case.

12 Coke 131 The rule is the same in process to compel
 4 Bac 454 persons to feed & maintain for the Peace and further
 along 600 good & behaviour. The rule is also the same in
 4 Bac 455 process for service only, and Detained -

And if a person known to have committed
 a Felony, is pursued with or without
 a Warrant, & process, the outer door or window
 may be broken open for the purpose
 of arresting him, and any private person may
 do the same. "Bacon", and others. say that
 3 Hawk 139 suspicion will not justify a breaking without
 4 Bac 444 a Warrant. - This I doubt. - But to pursue
 without a Warrant is dangerous, for if the supposed
 felon should not be guilty of Felony, then
 the person breaking the door will be liable
 for it, and likewise for false imprisonment.

Again the outer door may be broken
 open for the purpose of apprehending any affray,
 4 Bac 456, and to prevent a breach of the Peace. and if
 12 Coke 66 the person guilty of an affray, or breach of the
 Peace, they may be pursued into their houses
 & broken open to take them, without a Warrant.

And in one instance of Process merely Civil
viz upon a Writ of Habere Facias Possessionem,
directing the Sheriff to deliver possession of a ^(p) Stoke 91.
certain house. he may if denied admittance break
and enter it and thus he may avoid the necessity
of the Case. the writ can be executed in no
other way than by entering the house. —

So also in Civil Process the outer Door
of a house or other out house, not adjoining
the mansion house may be broken open. And ^{14 Geo 2 898,}
I suppose that a Store hut in actual Contact — ^{18 Geo 2 180,}
with the dwelling house might also be broken ^{5 Geo 2 182,}
open (the same extends to the Contrary ^{4 Geo 2 455+}
etc. are disposed to restrain the privilege as far
as possible. Consistently with ancient decisions
the I know of no instance in which this Case
has been decided either way.

If in attempting to execute Civil Process
the Bailiff or other follower of the Sheriff ^{Palmer 52}
having entered possibly is locked into a house ^{6 Geo 2 555,}
the Sheriff may break it to release him. —

And if a person having been once arrested
escapes to his house the Sheriff may break it ^{Palmer 54}
to retake him. for having been once taken the ^{5 Geo 2 173,}
Sheriff has an absolute Right to his person, ^{11 Geo 2 138,}
But if a

But if a person illegally arrested by breaking
 2. B. Rep. 823, his house is where in Custody of the Officer, & al-
 Exp'd of 665, no with legal process the last-said is good
 provided there was no collusion practiced by
 the parties or Officer. if there was both are void.

A Court said process might have been ex-
 Salk. 78, ecuted on Sunday, but by Stat. 29 of Charles
 4. B. Rep. 450, 2nd, and by our own Stat, it is provided that no.
 Q. 650, civil process can be executed on Sunday, and
 + Salk. 95, such process if executed is deemed to be void —
 + 5. B. Rep. 25, and the Officer making it is liable for all
 + 2. B. Rep. 1028, imprisonment — And I suppose as I was arrested
 2. B. Rep. 370, here as in the last case would be good provided
 there was no collusion, &c.

Salk. 620, But a person may be arrested on Sunday
 5. Mod. 95, in a civil process for escaping, and this is
 5. B. Rep. 25, on the same principle that he may be re-
 2. B. Rep. 1028, mained in prison on that day, it is enforcing
 + 2. B. Rep. 345, the actual Custody which the Officer had before

Salk. 15, Upon motion made the Ct. will discharge
 5. Q. 95, a person arrested on the Sabbath, &c.

Escapes. — An escape is where a person
 Exp'd of 607, lawfully, arrested or restrained of his liberty,
 Q. 658-9, either violently breaks or privately escapes & with
 B. Rep. 259, restraint or otherwise gets at large before he is
 2. B. Rep. 253, legally discharged, Upon the
 Cowper 65,

Upon the Law of Arrests is founded the Law of Escapes. in order therefore to constitute an Escape lawful there must have been a previous lawful arrest; the evasion of an illegal arrest is not an escape.

What arrests then are legal and what not? To be lawful an arrest must always be made in pursuance of lawful authority, *Repeal 455.* But by this is not meant that there must be a Writ or a Warrant in all cases, as was shown in the last Lecture.

When an arrest is made by virtue of a Writ or Warrant the Gen. Rule of the C. J. is that if the Officer under whose authority the Writ issues, has jurisdiction of the Subject-matter of the Process it is a lawful arrest. the mode being sufficiently proper, and not made on *2 Willms 384*
8 Coke 141
5 D. 84
Supp. 509
Exp. D. 333
D. L. 391
D. 659
Sunday. Suffering the party arrested to go at large in such case is an escape.

And it makes no difference if the Process is erroneous, if so it is not void, it is as effectual the same as tho, the Process were good, and lawful. for it is good to all intents and purposes until set aside by some Course of Law.

But on the other hand if the Officer under whose authority the Writ issues has no jurisdiction of the Subject-matter of the Process, the Process is void, and of course the arrest is void *I speak of it - Exp. D. 308*
D. 509
and

and therefore there can be no escape
this rule is laid down ^{by} but is not necessary
and is not well suited in England.

According to the settled rule in Conn^P the
Officer making the arrest is not liable to the
De¹ 110 182 party arrested in the latter case, unless the pro-
cess appears on the face of it to be void.
+ Devins 387.

But the, the first branch of this Genl Rule
is not universal. yet the latter is, for in
Baithen 148 certain cases where the Ct has suspected juris-
+ Mfgad 344 diction, yet the process may be void for being
Root 315 irregular e.g. if the writ is not made return
Esp Dig 328. also to the next session of the Ct. if there is
+ De 808-9. time for notice to be given, and the writ to be
returned. Such process is void.

The reason why this rule exists at C¹ Law
is that word the writ & afford to pass one Ct.
it might upon the same principle any
number. - and the Dept Court be the whole
the writ is returnable. When the writ then more
by erroneous, and not as the case might be return-
able until the end of the year, the Dept must
lie in jail during that time unless he find bail
but when such process is considered as void he
may be discharged on motion and maintain
his action for false imprisonment. It is therefore
just that the process should be as it is void
and of course the arrest under it unlawful

If therefore the Sheriff has taken a man on such a process, he should and must for his own security discharge him.

But this distinction between a legal and void process on the Genl rule of Law that where the process is issued by a Ct. that has jurisdiction over the Subject-matter, of the Writ is lawful, is not precisely adapted to our practice in Conn. — It means

By C. L. the Writ is issued from the same Ct. to which it is returnable. — But a void process does not Genl. issue from the Ct. to which it is returnable but from an subordinate magistrate.

Therefore I take the true ^{rule} on this Subject in Conn^t to be this (infra), in case of a void process but in case of a legal process it is the same as I have stated, before.

Rule. — If the process is issued by a Court of competent authority, and returnable to a Ct. having jurisdiction of the Subject-matter of it, the process is lawful, and the arrest, therefore there can be no escape. But if it is issued by authority not competent, or returnable to a Ct. not having jurisdiction, the process is unlawful and void.

It has been early decided in England that an Officer having arrested a person on a process

final process. Can't delegate to a stranger an-
 authority to hold him in this absence. For indeed
 12 Wynn 645 Can he would be guilty of an escape. "Scout"
 in named process. I think says that Jones
 the rule ought to apply as well to named
 as named process. So far as it extends to the
 Sheriff's power to delegate his authority for a
 prisoner in the keeping of the Sheriff is in
 for his protection. and he ought to be allowed
 to deliver him to a stranger to take to jail.

To the above rule of C. D. and W. is
 entirely opposed.

2nd There must be not only a
 lawful but an actual arrest and due regu-
 larly made. otherwise there can be no escape.
 4 Bac 236. - (The words will not make an arrest) - 6 at
 6th Decr 1884 there must be an actual touching of the
 Salk² - 79. person, or a power of immediately taking the
 D^o 586. person into custody, and a submission to that
 18th & 19th power, so when an Officer having a process
 agt a person tells him of it and the person
 immediately surrenders himself. this will be
 an arrest tho there was no touching.

If one is arrested at the suit of A and
 while he is in the custody of the Officer. a
 5 Coke 89. Second writ in favour of B is returned to the
 Officer, no service in the second writ is made.

Sarg
 1

necessary the mere delivery and acceptance of the
 second writ by the officer is an arrest in favour Salk 237.
 of E.B. without any formal touching. If therefore
 the prisoner should escape after the delivery 18 Selwyn 552 et
 of the second writ the officer would be liable
 for two escapes. And B might both have
 these actions agt him.

It is very questionable whether this rule
 would obtain in Conn. on account of our
 mode of practice for if it did the Off.
 would have no election to take the property or
 person of the Debtor which he has certainly the
 right in all cases. Under the Com Law both
 the process are "Capital Writts" but under our
 Law process issues not only agt the body
 but agt the Estate both real and personal.

Suppose A delivers a writ to the officer
 directing him to take the body, now here if
 personal property is levied the Officer -
 must take it. Suppose B then delivers
 a writ without any direction. Here again if
 there is personal property it must be taken
 and the officer may elect to take the real
 property rather than the person. - I think
 therefore the rule of C.D. is not applicable here.

3rd This actual arrest must also be reg-
 ularly and legally made. on there can be
 no escape. and in Civil Cases the arrest
 must

Exp 2 1/2 004

Cooper 84
2 Dec 236
must be made by virtue of a legal Writ
or Warrant. But in some Custodial Cases
an arrest may be made without any Writ or

Cooper 85
5 Mo 211
Esp Dig 604
Further the arrest must be made by
authority of the Officer to whom the Writ is
directed - but by this it is not meant that he must
be in company (viz) in the immediate presence
of his assistant or followers, the Officer need not
be in sight nor actually present when the ar-
rest is made. it is sufficient if he is near and
in pursuit of the same object. So, he may be
out of sight.

+ Esp Dig 604-5
Cooper 95
Salk 78
+ Cooper 9
An arrest made on Sunday is
void and of course there can be no escape. And
it is upon the same rule of law where an ar-
rest is unlawfully made by breaking gates, doors

In pursuance of this rule it follows, if
2 Mo 234 on Officer have an opportunity to arrest a per-
son for whom he has a Warrant and neglects
12 Co 331 to do it and the Defendant finally evades the process,
10 Mo 257-5 the Off. may have an action on the Case agt
+ 22 Co 234 the Off. but not an action for an escape

Escapes are of two kinds viz Voluntary
and negligent. I would here premise that
3 Co 44 says, Person committed to prison is to be
12 Co 806 kept "in and under a strong Custody" and if he

is, out of the limits of the Prison for a single ^{33 How 415,} moment it is an escape.

A Voluntary escape is one with the Consent of the Sheriff or Jail-keeper.

A negligent escape is one which happens without the knowledge or Consent of the Sheriff - the word "knowledge" here Mr Gould thinks superfluous.

1st - As to Voluntary escapes. If the Sheriff or Jailor admits a prisoner in a case not bailable, it is a voluntary escape. So it is 3 Coke 44 if he permits him to go beyond the limits for a single moment even tho, he has a keeper. The Prisoners 30. Said cannot and should not distinguish between respecting the time he is beyond the limits, or the distance he goes - if he might be sent one minute he might one year, and if one foot he might one mile.

It is likewise a voluntary escape of a Prisoner arrested on sumas process, if permitted to be absent with a keeper even before Commencement. - otherwise in sumas process. - page 30-1.

Prisoners committed on Criminal process are in Court and must also in England be confined within the walls of the Prison. But on Civil process the Sheriff may, in some cases, send them with the prisoners of the gaol on his

on their promising Sureties to save the Sheriff himself after the escape. a Security taken thus would in Criminal Process be void and was the liberty of the year granted it would be an escape.

It was formerly determined in England that where a Prisoner was committed on Est. if the Sheriff Geo. find out on a writ of "Habeas Corpus ad testificandum" he was guilty of a voluntary escape, and tho. there has been no contrary decision I trust the doctrine is too settled ever to have been Law Justice Blackstone I find denies the doctrine

1 Geo. 4. 13
 1 Wm. 4. 72
 1 Root. 72
 1 Ship. 137
 + 2 Wm. 4. 38
 page 37

But if an Officer who brings out such a Prisoner upon such process grants any unnecessary and unreasonable liberty to him it is an escape. So where an Officer in carrying up a Prisoner took him out of the way 60 miles for an airing, this was held a voluntary escape. The rule is that he must be brought up in a reasonable time and in the most convenient and direct way.

1 Wm. 4. 305
 2 Ray 341
 1 D. 399, 778
 1 M. 78
 1 Geo. 4. 14

A similar rule obtains where there has been an arrest on legal process and the Officer does not commit the Prisoner within a reasonable time after the arrest is made. Here the Officer is guilty of a voluntary escape.

1 Wm. 4. 34
 2 Wm. 4. 176

J. D.

If a Sheriff marries a woman committed to prison. She is "ipso facto" discharged, and he is guilty of an ^{voluntary} escape for the Law will not allow him to keep in prison his own Wife. -

If the Sheriff appoints one of the prisoners Head, 311 a Turnkey of the Jail he is guilty of a voluntary escape. For the prisoner cannot then be considered as under the Sheriff's custody; for he can depart when he pleases, and in such case it appears that it is not necessary that the prisoner should have actually departed. -

The Sheriff is not bound to grant the liberty of the prison yard to any one; it is a matter of indulgence, and is discretionary with him. Thus being the case he can at any time put an end to his privilege. And in fact, if a prisoner having the liberty of the yard, goes over the walls, without the knowledge of the Sheriff, he is only guilty of a negligent escape. But if he has manifested a disposition to escape the Sheriff should recommit him, and if he does not and the prisoner afterwards escapes it is a voluntary escape.

2d Rep. 151
D. Prosser 100
D. 27 or 127
1 Selwyn 649

Section 4

A Negligent escape is one that happens without the consent of the officer. - This needs no explanation for if the prisoner escapes by violence

Violence or fear from the Officer or in short
 5 Blom 415-16 escapes in any manner without the Officer's
 Co. for 419 Consent. it is a negligent escape. So also if
 5 Blom 130 he escapes by breaking jail, or rescue

And I would here observe that in an action
 Cooper 63-5 ag^t the Sheriff for an escape the Officer's inces-
 sment on the back of the Writ is sufficient evi-
 dence that the writ was delivered to him -

There is a material distinction in the Law
 respecting escapes between an arrest on mesne
 and final process. I have therefore ob-
 served that if after an arrest on final process
 the Officer permits the Prisoner to go at large
 even for a single moment, he is guilty of an
 25 Rep 172 escape, and the reason is that the imprison-
 2 Blom 415, ment is the Coercive means of ^{obeying} compelling pay
 18 Dig 1008-6 ment, and is in execution at the time of the
 18 Dig 144-5 arrest made. if the Officer might suffer him
 to go at liberty for an hour he might for any
 length of time and in this way the object of the
 Law might be defeated

But a Person arrested on mesne process
 before Commitment, may be suffered to go at
 large at C. L. and the Officer shall not be sub-
 25 Rep 1049 ject to a writ of Habeas Corpus if he is forth coming &c. will
 25 Rep 172 surrender him at the return of the writ. and
 8 Q. 37 the reason of this is that his process cannot be
 18 Dig 468 considered -
 2 Willm 296

Considered as coerced means to obtain payment. *3 Bl Com 415*
 because the Debt has not been liquidated by one
 course of Law. and further the object of this pro-
 cess is merely to compel the attendance of the
 Debt. in Ct. as a security for the sum which
 the Debt. may eventually recover.

The Officer is guilty of no escape till avoidance
 of the writ is made by the Debt. and if he
 does not appear at the time of returning the
 writ then the Officer is liable for an escape.

The Law of Corn on this subject is differ- *Kirkby 209*
 ent from the Com Law. Here the Sheriff- *D 382.434*
 is not liable if he is forth coming during *H. Com.*
 the life of the Execution, or until *Actions Civ.*
2. Series 174
inventus is found by him.

It may be asked when the Officer may make
 a return of "Non est inventus." There is no defi-
 nite rule as to the time, the Ct. have never es-
 tablished one - it would seem that a reason-
 able time ought to be allowed.

But if the Debt. arrested on mesne process
 is not forth coming on the return of the Writ-
 in England. and in Corn during the life of
 the Ex^{or} - the Officer is guilty of an escape, and
 the escape is a negligent one, tho. it is no where
 asserted in the Books, yet I think it can't be
 otherwise. It must be a negligent one for the
 Officer has a right to let him go at large till
 the

Supra
et

Pro Bly 523
D 552.808
Est. Dig 509

the return of the writ - therefore it can't be a
voluntary escape

But if the person arrested on mere pro-
cess is committed to jail, and is afterwards
permitted to be about a moment at a vol-
untary escape, How you provide the
rule is the same as in case of an arrest on
final process either with or without Com-
mitment - yet the reason I apprehend is dif-
ferent. - In this case the order is to keep "in safe
and close custody", and permitting the prisoner
to go at large is therefore a breach of the order
and of course agt. Law, - after the Officer has
committed he is "functus officio" - and has no
further concern with him. He is in custody of
the Law, and must be set at liberty by due
course of Law only.

2 Wilson 294
Salk 271
Esp. Dig. 610.
Rolle 807.
H. Con. 222
page. 115.

But on mere process before commitment
the order is only "him have to appear", and if
he goes at large but does appear at the return
of the writ there is no breach of the order and
of course no escape.

2 Wilson 294
Salk 271
Thiggen 588
Rolle 807.

If it is a voluntary escape the Officer can
never retake him and a voluntary return of
the Deft won't save the Officer.

And in third case of escape after ar-
rest on mere process after commitment
the Off. does not by proceeding to judge agt. the
the

2 Wilson 294

the party arrested waive his action ag^t the Sheriff Salk^o 371
 There may be many reasons why he should thus
 proceed. one very obvious one is to ascertain the
 amount of his Debt, in order to furnish a rule
 of damages in his action ag^t the Sheriff.

There is also a difference as to the remedy
 which the Plff. may have for an escape on 1 Cowp 648
rescued and final process

If one arrested on rescued process escapes 20th Feb^{ry} 129
 the action for the escape at C. & L. is Treason on 4 D. 611
 the Case, in which Case the damages are 2 W. Mon 295.
 Damages, and this action can't be supported - 6 W. Eliz 17
 unless the Plff. proves a legal claim ag^t the 25th Feb 873
 party escaping.

The rule of evidence is some
 what peculiar in this Case for where an action
 is brought ag^t the Sheriff, the confession of the prisoner
 out of Ct. that he owed the debt to the Plff. is good
 evidence ag^t the Sheriff. This is more hearsay
 evidence and the gen. rule is that hearsay evi-
 dence is inadmissible - The reason of this rule
 is that such acknowledgment would in a suit
 ag^t the Debtor have subjected him, and the Sher-
 iff ag^t the Sheriff, a Notionary escape. Having
 placed himself in the place of the Debtor shall
 be concluded by the same evidence.

If one arrested on final process, escapes the
 Plff. has his election of two actions or an action
 of Treason

25 Rep. 129. of Trespass on the Case, or under the Statute of
 Do. 132 Westminster 2^d and 1st of Richard 2^d an action
 25 Rep. 110 of Debt and it makes no difference as to his
 25 Rep. 1048. maintaining an action of Debt whether there
 Leg. 153 has been a commitment or not
 25 Rep. 203.
 1 Selwyn 042-3

But the more eligible cause for the Plff.
 is to bring an action of Debt - for there may be
 a material difference as to the rule of damages
 for in an action on the Case the jury may give
 25 Rep. 509. what damages they please with or without the
 25 Rep. 295. Debt, or a part of the Debt with damages. But
 25 Rep. 129. it is settled they are not bound to give the whole
 Selwyn 043- Debt. But if they give only special damages
 the Plff. may remove agt. and remove off the
 original Debt.

But in an action of Debt.
 25 Rep. 1048. under the Stat. the jury must give the whole
 25 Rep. 129. Debt and Costs in the original writ. for the
 25 Rep. 509. Stat. requires it - this can't be done on removal
 1 Selwyn 043. except for where the action is Case

Our Stat. seems in one respect to have
 furnished a new rule, and to require that in
 1 Conn. 356. Voluntary escapes, either on mesne or final
 Section 18. process, the Plff. shall remove the whole sum
 whatever the action may be. Upon which pro-
 ceed that it requires the same rule of damages
 in all Cases of Voluntary escapes
 The Journal

If a person arrested on mere process
is rescued or escapes before commitment the off - 3 Howe 416
fug is excused (i.e.) not liable. But if the ar - bio Eliz 873
rest is on final process he is liable: for how bio 419
it is said the officer had time, and ought to have Exp Dig 510 +
called out the "pope's Cornutatus." - 3 Bac 240 +
To me this reason is not satisfactory, for after the officer
receives the warrant he must arrest the party
wherever he sees him.

But after commitment on mere process - Howe 808
a rescue is no excuse unless it is by public Coke 84,
enemies for no other power but that of public Exp 482
enemies is presumed equal to that of the Exp Dig 410,
off, and this presumption can't be rebutted. -

And the rule with respect to rescue is the
same where the person is arrested on final process
as the not committed to prison as I have here
before observed. In case of rescue the Off may
sue either the Sheriff or the rescuers,

By bringing the action agt. the rescuers
it is said he waives his action agt. the Off - Exp Dig 507-9
and this rule laid down by "Espinaspe the Off" 610
not supported by any authority. Directly in Howe 211
point appears to me reasonable. For if the Off bio 77
might when he pleased resort to his action Howe 109
agt. the officer he might continue it agt. the Howe 98
rescuers until he became a bankrupt - and then
resort to

resort to the Sheriff, and then the Sheriff would be without redress.

Where the Plff brings his action agt. the Sheriff, it should be framed as Trespass on the Case - It is laid down in "Hobart" and Cro. Jac. - Hobart 180, that he may either bring Trespass, or Trespass on the Case agt. the Sheriff. - It is said in "Hobart" 180, that this is not so, and I doubt whether Trespass can be maintained, it is not adopted in the Plff's Case. If the action of Trespass is considered the proper one, the Plff must be considered as a pledge in the hands of the Sheriff, but this cannot be. Again the damages are consequential, & clearly then it ought to be Case, and further I know of no Case in which Trespass and Trespass on the Case are concurrent.

In an action agt. the Sheriff the jury are at liberty to give only special damages; and if the Plff recovers only part of his debt he may proceed agt. the Deft, and recover the whole at a time; but the the jury may in such cases give less than the whole debt, they hardly ever will. I think the jury are bound in conscience to give the whole demand, for reasons are entitled to be favored.

In an action agt. the Sheriff for an escape, in Cases where rescue is an excuse for the Sheriff, his endorsement of rescue on the back of the writ.

What is conclusive evidence in his favour - But Combs B93
if it appears to be a false return the Plff may West 224
sue him, and prove the endorsement to be false 20° 175

This rule of the C & has been said to be at
sued and unreasonable, but I think it is not. -
the reason of taking this circuitous mode instead of
contradicting the return, is that an official act of
an officer of the Law is never to be contradicted un-
less the pleadings put the falsity of it in issue -
for in case the Plff. sues for rescue the return of
the writ is not tendered as issue, &c.

But it may be doubted whether this rule is
Law in CONN, for a Sanction rule has been ex-
posed. If a Sheriff has made a false return
in England, the Plff. can't contradict his return
and plead it in a statement, but he may sue him
for the false return, In CONN the Sheriff's re-
turn may be contradicted.

The officer may have his action agt. the return
in those cases where he is himself liable
to the Plff. on which his right of action is founded

As the Sheriff is liable for rescue after the
prisoner has been committed, its evident he is
liable for a rescue when bringing him out on a
"Habeas Corpus". - You will remark that
after a person is arrested on final process and
after he is committed on any process, no rescue
is except.

Coobha 77
109
180
Hutton 98
200 399
Hep 482
C. & D. 510
page 28
4 Coke 84
130 808
200 789
300 113

2d Dig 610. unless it is made by Public enemies, or over-
 1d Dig 644 signed by the act of God, will excuse the Sheriff
 And is added that Lord overruled in any
 2d Dig 247. other way than by Lightning, by means of which
 prisoners escape, will not excuse the Sheriff. -

There are some distinctions between the
 Consequences, of Voluntary & involuntary escapes

It was formerly held to be said that in case
 of Voluntary escape and found process the Sheriff
 was absolutely discharged from the Duty of
 man, and that his only remedy was agt the Sheriff
 but that is not now considered to be said.
 As the rule now stands, the Sheriff may either have
 an action of Debt agt the escaped or a new Ex-
 granted agt him as a "sive facias". Debt is
 sometimes preferred because on it the escaped
 may be forthwith arrested. - And now by
 Stat. 8 and 9 of William and Mary a new Ex-
 may issue without a "sive facias" or if it seems
 the Sheriff may retake the escaped and the old Ex-

And if the party escaping was committed
 on return process the Sheriff may retake him
 and "escape to arrest" when the escape was vol-
 untary.

But where the escape was voluntary the
 Sheriff can't transfer him, and is liable
 in an action agt him, for he is "particeps Criminalis"
 and

and, such taking would subject him to an action of false imprisonment, - 1 Selwyn 544 at Lich. 10 D.

A voluntary escape is always a crime. Hence it follows that a Bond taken by the Sheriff to save him harmless of a voluntary escape is void as being agt. Law. - For it is the tendency if not the object of such bond to produce such an illegal escape. 10 Coke 100, 2 Bulst. 313, Parole 196 +

Altho. as I have observed in case of a voluntary escape the Officer permitting it cannot detain the escapee yet the Off. is in the wrong, may, and thus he may be sued after he has recovered agt. the Officer provided the sum paid covered less than the Debt and Costs with which the person escaping was charged in the Ex. - 1 Selwyn 549

But in case of a negligent escape the Sheriff may either detain the escapee, or he may if he choose commence an action immediately agt. him for the escape and this right of action accrues to the Officer immediately on the escape, for were he compelled to wait until he had himself been subjected by an escapee of the Off. he might lose his remedy. 1 Selwyn 549, 53, 234, 3 Coke 58, 1. Dig. 513 + 13, 1. Bac. 450, Reg. 5. 37. -

And if the Sheriff has taken a bond of indemnity, agt. a negligent escape, he may maintain an action upon it - for as the escape is not illegal the bond is not void, - But when

But when the Sheriff's Bailiff has suffered a negligent escape he or the Bailiff can have no action or remedy agt. the escapee. Tho, the Sheriff in such case may have an action agt. the escapee, and he may give the Bailiff the benefit of it by permitting him to sue in his name. Now have they any Stat in England enabling the Bailiff to maintain an action for the Bailiff is liable, over to the Plff. only in cases of passive force. He is to be sure liable over to the Sheriff for his own negligence, but this is by his own Contract - and not by operation of Law.

But the Law of Conn^t is different here the under Sheriff (for we have no Bailiffs) - is a known Party & gives the escapee to arrest in his own name, and he (as the Sheriff in) England, is liable over to the Plff. he has therefore the same right of action agt. the escapee, and for the same reason.

There has arisen a very important question in the N.S. & viz. Whether an escapee can be taken by a scope warrant in another State than in that from which he escaped: or whether a Bail can retake his principal in an adjoining State by a Peace piece? It has been determined in this State and I trust it is Law that he may be retaken on a scope warrant. It is

It is not the warrant which gives the right for a person seized in a prison by one sovereign State. Can't extend into the jurisdiction of another. The Warrant is I conceive only the evidence of the Officer's right. But the escape cannot in such case be taken on the old Est. - nor on a new one granted on a *Siue facias* - as he may be in the State, for the authority of these does not extend into the jurisdiction of another Sovereign State.

This case bears a strong analogy Johnson *vs.* Nichols to the case of recapture by Spanish bail in one State, and the escape retaken in another Sugarale + this has been decided legal both in New York 32 Day 485, and Conn. -

On an escape Warrant any person may within the State take an escapee. But I suppose the Officer may retake him out of the State without such Warrant. -

If a person arrested on Criminal Process escapes he is guilty of an offence at C.D. and punishable by fine or imprisonment. - Seem. in Civil Prosecutions unless he breaks the Prison Walls and then he is punishable for Prison break.

At C.D. if a person escapes, ^{by breach of Prison} then arrested on Criminal Process it is Felony. It seems that this is not by the Professors considered the same in Conn. - for breach of prison is not an uncommon thing & at I never knew a prosecution for it.

2 Hawk, 132
D^o - 128
4 B. & M. 129
D^o - 130,

The Officer Suffering a negligent escape in a Criminal prosecution is punishable by fine And if he Suffers a Voluntary escape he is punishable in the same manner as the Prisoner would have been, he is in the nature of an ac-
 43 Com 130. cused after the fact. But the Officer can be punished in such case till the delinquent has
 1 Hale 590 actually received judgment - for if it were otherwise
 2 Hawk 134 it might happen that the Officer might be
 + Hobart 590 punished for Treason or Felony, and the Person
 arrested and escaping might turn out to be
 an innocent man.

Yet before the conviction of the Criminal the
 43 Com 130 Officer thus offending may be fined and imprisoned
 for a misdemeanour. -

If an Officer who had Suffered a negligent escape has been forced to pay the Debt for which the Party escaping was arrested he may undoubtedly maintain an action of "Trespass against a person" agt. the officer for money paid out to his use. For the rule is that where for the Detention & detaining together two Persons one is compelled to pay the Debt of the other this action will lie.

But if a Bailor or a Sheriff commits a Voluntary escape, and the Sheriff has to pay the Debt it does not seem settled whether the Sheriff can after this maintain an action
 of

of "Tresp.^t aff^t" - ag^t the weapon. It has been
 twice decided at "Nisi Prius" that he could maintain
 the action, but these decisions were afterwards
 overruled by Lord Kenyon in a similar case.

25 Rep. 154
 612
 140
 Salk^r - 18

I think says Mr. Gould that the two first de-
 cisions were correct and that the action can be
 maintained. The Deputy cannot it is true.
 maintain that action, for he is "particeps Crimi-
 nis" - and for the same reason it is said the
 Sheriff cannot, for "qui facit pro alium facit
 pro se" - This maxim is true in civil law, and it
 is on this ground that the Sheriff is subjected
 in the first place; but the Sheriff is not
 liable criminally for the acts of his under
 Sheriff, and the Sheriff in this case cannot there-
 fore be considered "particeps Criminis".

If after a negligent escape the Sheriff re-
 takes the escaped before action brought his liability
 to the Off. is thereby discharged.
 The rule generally laid down is that if he takes
 on fresh Suit, &c. but it has been determined
 that any judgment before action brought is by fresh
 Suit.

1 Kent. 211
 Do - 217
 25 Rep. 120
 100
 908 +
 44.50 +
 557 +
 873.

According to the Com Law rule of pleading
 upon a fresh Suit must be pleaded spe-
 cially and can't be given in evidence under the
 Gen. Issue. But by our Law in Court it may
 be given in evidence under the Gen. Issue.

25 Rep. 120

For our,

For our rule is that under the Gen. Issue the
Defendant may give in evidence any matter which
is not an act of the Plaintiff discharging his right
of action.

But if an action is brought against the
Sheriff before a writ of Habeas Corpus or subsequent escape
then will not discharge his liability to the Plaintiff
for by bringing the action the Sheriff has at
tached in himself a right of recovery which
the Defendant cannot by a subsequent act defeat. -

6 Co. Dig. 587
Hug. 873
6 Co. Dig. 587
3 Co. 44. 52
+ Rol. 808
4 B. & B. 247
Voc. 3. 401

And as a writ of Habeas Corpus or subsequent
action brought against the Sheriff will discharge him
also a voluntary return of the prisoner into
Custody before action brought against the Sheriff discharge
him from his liability to the Plaintiff for here
he is in custody at the time the action is
commenced which is all the Law requires.

But as to a voluntary escape & escape
before the commencement
of the action, is no excuse for the Sheriff, it
does not discharge him. The Plaintiff's right of
action commences at the time of the escape &
it is then complete and as act of the Defendant will
discharge his liability.

3 Co. 52
2 W. 24
Ex. Dig. 511-12

And as to a voluntary
escape & subsequent arrest of the Plaintiff to the
escape will not discharge the Sheriff from liability
T. 100. 101

Salk. 271
D. 512
Ex. Dig. 512

I do not I confess understand what is meant by
such subsequent arrest In the case relied on
for the support of this rule. So Holt took the dis-
tinction, that a prison arrest would, but a subse-
quent one would not discharge the Officer, - If
by prison arrest is meant permission from the Off.
to release the prisoner the Sheriff is undoubtedly dis-
charged for it is no escape And if by subsequent
arrest is meant nothing more than a retro
discharge, the above rule is undoubtedly Cor-
rect: for after the right of action is completed
a subsequent prison discharge will not bar the
action.

See per. cell 486
34-5-194
Vol 3, page

page 486

In case of a negligent escape the Sher-
iff has a right of re-arrest for his own security
even after the action is commenced agt him
by the Off. in the pro ex for such action does
not discharge the escape.

And it has been determined in England, and
I take it to be a rule, that a Sheriff
has no right to discharge a prisoner commit-
ted on Ex upon the prisoner paying the
contents of the Ex to him, and if he does he
is liable for a voluntary escape - It is the usu
a course of proceeding in this State, but it
is not strictly legal, - and the reason is the
Sheriff is not an agent for the Off. in receiving
the money, for after commitment he is only to
keep "in cust et salva Custodia", and this
is all

See Clay 404
1844
D. 325
D. 330
D. 348
page 32

is all his duty. Before Commitment he must
doubtless, ask and must if the money be of-
fered him, discharge the Prisoner.

I have already observed that after a neg-
ligent escape the Officer may release the es-
caped. & if it seems to be a settled rule that
if the Off. after a negligent escape discharges
the escapee, the Justice Court takes the escapee
20 Aug 1768 in his fees. & if it seems he might have re-
leased him in Prison. after the Debt is paid,
and he is discharged by the Off.

I suppose the reason of this is, that the Jus-
tice is supposed to be the guilty person, and
having suffered the Prisoner who was supposed
to go out of his hands he never shall recover.
He has lost his Lien on the Prisoner of the escape
God is a God, & that if a person gives up
the possession of a thing for a moment & which
he has a Lien, his Lien is lost. &c.

An escape by a person having the Li-
en of the year & being a negligent one, & re-
leased 100, & having the Voluntary Return before Suit & re-
charges the Sheriff.

I suppose if the Officer has taken a Bond
of indemnity, & that he is no longer liable to the
1 Root 105 Off. in the Sheriff, & if such escape he may
107 maintain an action on it, & he escapes but
127 for a moment and immediately returns. God

For it is a partial Contract agt. this very act. But he being discharged from all liability on that account to the Shff. will recover only nominal damages.

And it is decided after such negligent escape from the Prison again. whether the Prisoner Root 128) once nor the bond man can compel the Shff. to receive him again. —

Under our Law actions bet^d agt. the Sher-iff and other Officers for neglect of duty, are now dead after a lapse of two years, from the time the right of action accrues.

Hence if after such escape the Shff. right of action is barred by the Stat^e of Limitations, which is now two years, the Sheriff cannot recover the Debt on the bond of indemnity. For there is no consideration, and if judgment had been recovered on the bond, and the Stat^e of Limitations runs out the Shff. claims the Debt may be relieved by an "Assida Duenda". —

There is one very important rule of Pleading which seems to confuse the distinction between voluntary and involuntary escapes. "If a man a Capt for a voluntary escape the Shff. may give in evidence of negligent and, and the evidence will support the declaration, and compel the Debt. may plead in abatement or justify before the.

West 217.
25 Rep 130
West 211

the action lies, and thus he may do without traversing the voluntary escape.

How far it may be asked is the Plff. to come himself of the distinction between a voluntary and negligent escape? He is to do it in his replication which is in the nature of a non-assignment and then the Sheriff must answer it. But the usual and most approved course at present in England is not to plead on the escape as voluntary but generally, and then to set it forth as voluntary in the replication.

I have hitherto observed that for a voluntary escape the Sheriff or Jailor is liable but for negligent ones it is only the Sheriff.

If the Plff. sues the Jailor & under Sheriff for a voluntary escape the Sheriff is discharged. I find no authority for this rule but the dictum of Espenape. But the rule appears to me reasonable for this action may prevent the Sheriff from taking security agt his servant and it is too late.

If a second action commenced agt the Sheriff for an escape on, since per ass. and before Holbth 209, plea pleaded the original bond agt the Sheriff, escaped is reversed. the Sheriff is discharged himself by pleading. See the Dr. and. - For as the Plff. must on such plea produce the writ.

Judge, which is now annihilated. the Sheriff's
defence is complete.

But after Jura pleaded, or rather after
Judge (for now pleas may with propriety of
the Ct be changed), if the original Judge is ^{de,} ~~re-~~ & like 143,
wound, still that agt, the Sheriff is good.

But this will be the, have, that even then such Days Cases
Judge agt the Sheriff should be good - I don't ^{in Error}
know, say ^{that is meant} Mr. Jura by such Judge & any good ^{Phelps vs. Jura}
unless that it can't be reversed by Writ of Error,
for it's certain that the Sheriff may be released
by an *audita querela*.

False Returns

If the Sheriff on oath of
fear makes a false return he is liable to
the party aggrieved in an action on the Case 815
and the party may be called the *Pff* & *Def* 1815 330.
So if the Sheriff makes a return of service on
the *Def* when in fact he had made none and
action will lie in favour of the *Def*.

But in such case the *Pff* not being
subjected to any damage can have no action,
tho in England in C. 2, the rule is if the Sher-
iff makes a false return the *Def* can plead
in abatement in contradiction to it. But he
must sue the Sheriff in an action on the
case, for this false return.

But in Conn^d the rule is otherwise; here
the

here the Deft may falsify the return of the Sheriff in a piece of statement and the consequence will be that the Suit will be defeated and an injury will happen to the Plff, and he may sue the Sheriff for a false return.

It would say "I would" in such case. I suppose good and action will lie both in favour of the Plff and Deft.

But upon principles of the C. L. as well as our own if the Sheriff makes a false return of "non est inventus" the Plff may have an action but the Deft as he can't sue for by it can maintain no action.

I used to propose to consider some Statute regulations of our own: and I used here to premise that all prisoners except Felons accounted and by C. L. liable to support their Selves.

Our Statute provides that all prisoners committed for offences shall bear the expense of commitment and of their support if they have means and ability to do it and that their Estates are liable. If they have no Estate they may be assigned in Service. But the expenses are first paid out of some public treasure and the Sack then turning up, the Prisoner.

If a prisoner takes greater fees than

are by Law allowed he is subjected to double damages to the prisoner and a fine at the discretion of the County CP.

A person committed in a civil case must bear his own expenses unless he is admitted to the poor prisoners oath. -- The amount of this oath is that he has not estate sufficient to pay the Debt nor so the amount of 17 Dollars and that he has not conveyed it Root-117 away to defraud his Creditors nor in the expectation of avoiding from it any future advantage, -- He is then discharged from prison unless the Creditor furnishes the jailor with what is called a weekly maintenance for the prisoner the amount of which is determined by the County CP.

But tho. the prisoner be discharged yet any property which he may acquire subsequently is still liable and this may be taken Root-58, on a new Ex^{ca} obtained by "Seire Facias" The only effect of the oath is to discharge the person.

Before the oath can be administered the writt in the Ex^{ca} must have four days previous notice to appear at the jail and then St. Con. 305. Cause why the oath should not be administered -- any Justice of the Peace or a Justice in the County may administer the oath. -- If the

If the application for the oath is unsuccess-
 Appal. He can make no other unless it be
 to the Chief Justice of the Court Pleas, and one
 At Court 305 Justice or to two Justices, one of the quorum
 and if the oath is administered the Creditor
 has the same right of appeal to the same
 Magistrates. Who may at their discretion
 direct the weekly allowance to cease.

If the oath is administered and the
 At Court 305 Off. continues to furnish the weekly support
 this will be added to the Debt and the Debt-
 or must before he can be released discharge
 the whole.

When one County has no jail any
 At Court 305 person liable there to be imprisoned may by
 proper authority be sent into any adjoining
 County.

Our County has power to order
 into Close Confinement all persons having
 the liberty of the yard if committed on Ex. or
 for Debt Damages or Costs, unless such Ex. or
 was issued by the Sup. Ct. and that this Ct.
 At Court 305 has the same power. This order of the Ct.
 is peremptory, and for disobedience the Officer
 is liable for a voluntary escape for which
 the S. or in this case orders Close Confinement
 without suffering the prisoner to be out is a
 voluntary escape.

At Court

This authority of these Ct. does not extend to these cases, where the Judge on which the ^PStonn 365, Ex^o issues, does not exceed 17 Dollars.

In Conn^P, if the Prisoner escapes there, the insufficiency of the Jail, the County and not the Sheriff is liable for the escape ^{Stonn 320.} The Jail is here built by the County, and by ^{D^o 457-8} the direction of the magistracy of the County, ^{Root 450,} and it is not the Sheriff's duty to keep a sufficient Jail — But in England in such cases the Sheriff only is liable, for there it is his duty to build and keep in repair the Jail but here it is the duty of the County —

The remedy which the Pl^f has in such case ^{Stonn 323*} is by petition to the County Ct. and the County Judge 318 praying relief no action in Law will lie. ^{Root 158} in this case. If the petitioned Jail he is ^{D^o 275, 357} allowed and appeal to the Sup^r Ct. * ^{D^o 450, 505} ^{Root 30,}

In Gen^l, however the County is but nominally liable in these cases, for the reasoning and decision of the Ct are "that if the Debt ^{Root 125} is a responsible man and able to pay, ^{D^o 155, 278} the Pl^f. he ought to look to him, and not to ^{D^o 357, 505} the County, and if he is not a responsible ^{Hirby 318,} man and is totally unable to pay the Debt, the Ct then say "the County shall pay nominal damages only, for the Pl^f. has lost nothing —"

nothing, ^{for} he would have got nothing by receiving the Debt in full. and therefore he might as well be out as in!! Now this is mark as I said - Sound and ridiculous reasoning. and it is also an impolitic rule for so long as the capture of a convict, the County has no inducement to keep a good Jail.

But I supposed where the party escaping is sufficiently able to pay the Debt at the time of the escape, but by means of escaping he runs away and evades the payment of the Debt, the Jff. could recover the whole Debt, from the County - for the reasoning of the Ct. does not touch this case.

But here if the escape is facilitated in any neglect of the Officer, as if he knows the Prisoner was in such a situation that the Prisoner could probably escape, and takes no precautions to prevent it the Officer is himself liable, - So also where he knows the Prisoner has implements to effect his escape and does not take them away from him. &c. &c.

Miscellaneous Rules of Com^o Court

May 1833 It is Ordered & voluntarily discharged a Debt-
 7th Dec 1820, and who is taken on Ex^o - whether Committed or
 2nd Dec - 33rd not, he can now again retake him, & so on -
 10th Dec 6th 33rd find Jufft, & p, him, the Debt is lost forever,
 8th Dec - 123rd If a bailor does take Sheriff to discharge him
 4th Dec 22nd it

is sufficient - page 45.

Ch. 182.

And if the discharge of the prison
or is on a Condition or promise to pay the
Debt &c. and this Condition or promise is not
or performed. Still he never can retake him.
tho. the Debt is never paid. So if there is an
agreement or promise on the part of the prison
and that the Creditor may retake him and
Commit him again on the old Ex^{te}. if he does
not pay the Debt, say such a time. Still the
Creditor can retake him on the old Ex^{te}. the
Judg^t and Ex^{te} are discharged. The reason of
the above rules is that the body is considered a
satisfaction, for the Debt. and still in custo-
dy it is so. And the Creditor having a satis-
faction in his own power. if he discharges it
it is considered that he means to discharge the Debt.
But in the last case the Creditor may
have an action grounded on this promise
for the discharge is a good Consideration. -

And so far has this rule been extended
that if this promise is destroyed for some
informality in the writing or contract still
the Judg^t and Ex^{te} are discharged. and the Cred-
itor has no remedy. unless the informality
is such as a Ct. of Chy. will aid. he can have
no remedy on the Judg^t.

And further it is settled. that if the
Diff

14th Feb 1842, 2 East 253
 The Plaintiff in the last case should take from the
 Debt as it was under seal, that he would sur-
 render himself within a certain given time
 this bond is void, as agt. Law, and the Plaintiff has
 no remedy upon it, and the reason as above
 stated is that a voluntary discharge of the
 12th Feb 1844 prisoner is a total discharge of the Debt.
 The bond is agt. Law therefore as an agreement to
 submit to false imprisonments -

10th Feb 93
 Q. 193
 5th Feb 574
 12th Feb 690
 10th Feb 551
 5th Feb 881
 12th Feb 182
 10th Feb 182
 If two joint Debtors are taken in Ex. and
 a discharge of one of them is a discharge of
 both, a release of one is a discharge of the Debt
 and of course the other must also be discharged
 each is liable for the whole Debt and as a
 release of one is a release therefore of the whole
 Debt the Ex. is satisfied.

And tho they should be joint and several
 Debtors, tho I don't find any principle as
 to this point yet I should think a discharge of
 one was equally a discharge of both for tho
 the original Debt is joint and several yet
 they are joined in the judgment and must be
 joint Debtors by the judgment.

But it is necessary to distinguish be-
 tween a joint indebtedness and a common
 liability in the application of this rule;
 for if under the Law Merchant the holder of
 a bill of Exchange on promissory Note &c. is

and I would and discharge him he may not-
withstanding I see any other Indorsers of the Note
and the reason is they are not joint Debtors
each one of the Indorsers is bound independently
of the others, hence they may be all prosecuted
ag't. at one time, or any one of them at a time
and if they are all taken in Ex^{or} a discharge
of them does not discharge any of the rest.

23 Rep. 1235
45 Rep. 825
2 Shower 481
Chitty 2d 124
D. 155
D. 181-2+

It was formerly held by Lord Holt that
if a sole Debt imprisoned or Ex^{or} died in pris-
on the Debt was forever extinguished, and I
supposed the reason of this was that as the Debt
had taken his highest remedy, he need should be
permitted to have any other. But this is a
fallacious reason, and I consider this now not
to be law for there are more numerous decisions
to the contrary, and now by Stat 21 James I.
it is enacted that in this case the Debt may
be out a new Ex^{or} ag't. the Estate of the de-
ceased Debtor.

Hobart 52
2 Bac 203 54
Cro Eliz 850
Cro Jac 136
D. 143
Stat Just 1
Hibby 183

But it was always held that if one
of two joint Debtors died in prison the other
was not discharged.

5 Coke 80
Cro Eliz 850
Cro Jac 136
D. 143
Cro Cha 131

I have said that a Sheriff may take
a bond of insolvency ag't. a negligent keeper he
then has a right to take a bond that the person
will remain a faithful prisoner till he is dis-
charged

West 237
10 Coke 100
Plowden 88
2 New Cont 173

Robert. 14 discharged by the Court of Law. But a bond
 28th Nov 351 to the Sheriff to remain a true prisoner until
 + 1st Dec 785 the fees and bond, were paid is wholly void as
 + 4th Dec 464 being agt the construction of the Stat 23rd of
 + 10th Nov 159 Henry 6, commonly called the Stat of ease
 + 12th Nov - 8 and also the Sheriff may retain
 the prisoner for his fees up to a penal bond
 for them is void. And it has been determined
 that the whole bond is void in such case
 altho. a bond to remain a true prisoner alone
 would be good.

Our Sup^t, Ct have adopted a rule
 Root-158 that it is void only as to bond, i.e. he is not
 bound by his bond to remain a prisoner until
 his bond is paid.

Two regulations respecting jails in Conn,
 See St^{ts} Conn^d 122, 144, 221, 322, 365, 366. &
 Ch^o 223. and Root 117.

All prisoners at Conn Law are to support
 themselves except as before & save Volons a few
 attended whose property is forfeited to the King
 and in fact, if Law be therefore has no money.

Plowden 88 The Conn Law furnishes no provision for
 1st Nov 32 Prisoners. Plowden says they may live
 12th Nov 583 upon the charity of the People. and if they cant
 get that, in God name let them die!!!

Finis

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Executors and Administrators

Executors and Administrators

How J. Revere, Esq. and J. Gould Esq.,

July 1842,

Executors and Administrators are the representatives of deceased Persons, i.e., as to their Personal Estate and as to their Estates which affect their Personal Estate.

1 Comyns 139
Co Litt 269
2 Bac 439.
3 Bac 287.

An Executor is a representative "ut supra", appointed by the last Will of the deceased. His duty as Ex^r is to execute the last Will of the deceased. The appointment of an Ex^r is often made to the existence of a Will or will be held. But this is not so says Judge Revere.

To make an Ex^r it is not necessary that the word "Executor", should be used. It is sufficient if the intention of the deceased to make such a person his Ex^r appears. As if he should say I commit all my Goods to the disposition of A. - West 8, 12.

A disposition of Personal Property not containing the appointment of an Ex^r in contemplation of death is called a Testament, and is to govern in the disposition of the Personal Property of the deceased. In some of the Books it is called a Codicil. - That there may be a Will without a Testament, & vice versa, -

The warning and Ex^r is by implication a Gift.

3rd 392 Gift to him of all the Goods of the deceased and
 Joseph 82 Ex^r - being bound to pay the Debts, And so the
 Writings, B. naming an Ex^r makes a Will -

3rd 407 At C^o a testamentary disposition of Land
 without naming an Ex^r - was called a Will -
 Co Litt. 111. But such a disposition of Chattels was called
 a Testament "ut supra" -

The ^{Ex^r} is the representative of a deceased
 person. "ut supra" appointed by Law through
 1 Comyns 257 As proper organ a minister. He is appointed
 2 Blom 507 in four cases only. 1st Where no Ex^r is
 appointed. 2nd Where he cannot act as Ex^r.
 3rd Where he will not act as such.
 4th Where there is no Will. Then the persons interested
 Ex^r and Adm^r - are considered in Chy.

2nd 331 as Trustees to those who are entitled to the pro-
 3rd 5207 Social effects of the deceased. and hence the
 3rd 287 jurisdiction of Chy. in cases of mere personalty
 between Ex^r and Adm^r - and the rest of King,
 Regent &c

The "Heir" is the person appointed by
 2nd Blom Law to succeed to the Real Estate at the
 death of the ancestor.

3rd 456, A "Devisee" is the person entitled to the
 Joseph 871 Real property by the testamentary appointment
 of the deceased.

3rd 466, A "Legatee" is one who is entitled
 Joseph 871 to Personal property by testamentary appointment

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The power of Ex^{or} and Adm^{or} is merely that of
Trustees of the Personal Property of the deceased
Ex^{or} so far as they are entitled to it, over Real
Estate they have not as Ex^{or} and Adm^{or} - any power
The Real Estate was not originally testamentary.

An Ex^{or} may have the disposal of Real
Estate, like other persons by the express appoint-
ment of the Testator. So if the Lands be devised
to be sold for the payment of Debts, the Ex^{or} the, D^r -
not empowered to sell is in Chy. Considered the,
proper person, no other being expressly empower-
ed. But the Adm^{or} as such has in no case any
such power, and neither of them hath any right
to the Real Estate as such in any case.

A Legatee receives his Leg^{at} any time the Ex^{or}
Admin^{or} takes possession without the interven-
tion of the Ex^{or}

3 B^{ar} 392
Weston 3, 4
Lovelace 218,
Atk^s 520,
D^r - 420,
Penderg 525
3 B^{ar} 457
West. 27-9
Dyer 254

The Personal Property is by Law charge-
able with the payment of all the Debts.
But the Real is liable for Debts by Special
ties and record only.

By Law over and above since the Stat^{ut} of West-
minster 2^d. Debts (i.e. judg^{ts} Debts) bound the Real
Estate from the first day of the term in which judg^{ts}
was rendered, and Goods and Chattels, from the date
of the Ex^{or}. But now by the Stat^{ut} 29th Charles 2^d -
they bind the Land as aq^{ts} bona fide purchasers,
only

Lovelace 93
2 B^{ar} 457
1 Atk^s 420,
3 B^{ar} 457

only from the day on which Jst is signed, and
the Good and Chattels ^{only} ~~from~~ from the delivery of the
3. Bad 20, Ex. - to the Officer. According to the old Law
Jst bound Land in the hands of the Heir from
the time of the original writ purchased

Specialty Creditors may resort to either the
Real or Personal Estate and if they come
upon the latter, and it is not sufficient to
Savelly 93 discharge all the Debts, the Simple Contract
2-3. How. - Creditors are liable to lose all their demands
as the Court may act without any remedy at
Law, since they cannot take Real Estate, and
are postponed to Specialty Creditors.

But in this Case Ch^{ty} will relieve them
189. Off. 44 by letting them in upon the Real Estate for
- 2. Ch^{ty} 43 so much as the Specialty Creditors have taken
Savelly 37, from the Personal Fund. Hence the Simple
Fellows 53, Contracts stand in the place of the Specialty
Creditors as to so much of the Real Estate.

This relief is afforded by Ch^{ty} ordering a Sale
of the Real property in the hands of the Heir
Salk 416, and the same indulgence is extended to ^{any} Lega-
tees, as to Simple Contract Creditors. - If the
avails of the Sale are insufficient an average
is to be made.

Of the Creditors in equal degree
- 3. Pth 481, he who first obtains Jst ag^t the Ex^r is entitled
to his whole demand even to the exclusion of the rest,
and if

And if one of the Creditors has commenced *Repley 287*
 a Suit at Law. or has a Bill in Chy, is the rule *Repley 217*
 now is the Ex^{or} cannot defeat his Claim by Volun *3 B. W. 1401*
 tarily paying other Debts of equal degree. —

If Land be devised to an Ex^{or} for the Payment
 of Debts, the Ex^{or} cannot for that reason be Sued *Repley 920*
 at Law by a Creditor as having assets. Now *2 B. W. 1410*
 can he be compelled at Law to make Sale of *2 Nov. 106*
 the Land, the Land not being considered at Law *1 Comyn 1401*
 assets in his hands so as to Subject him. —

But Chy. will Compel the Ex^{or} to Sale, —
 and that even tho. the Devise is not expressly *1 Atk. 1120*
 to him, if it is to no other person. —

Assets are all such property of the de-
 ceased as his real or personal representatives *2 Thom.*
 for the purpose of enabling him to discharge
 those duties which have devolved on him as the
 representative of the deceased. —

Assets are of several kinds as 1st Real *Barthol 127*
 i.e. such as descend to the Heir. and make *Somerset 45,*
 him liable to such Debts of the ancestor and *1 Comyn 3989.*
 claims upon him. as find the real Estate. *3 Bacon 32*
 2^d Personal i.e. such property of the de- *3 Mod. 284*
 ceased as comes to the Ex^{or} as such, and makes *3 Levin 280.*
 him liable to Creditors. and Legatees. — *2 Thom.*

Again Assets are either Legal or Equitable.
 Legal

Legal are such as go in a course of Justice.
 1. 430. Auction, i.e., according to the order or priority,
 30. 341 of Debts. "Equitable" are such as are dis-
 Due Chy 179 tributed. "paid paper," among all the Cre-
 2. 412 ditors.

An Equity of Redemption of a Mortgage
 1. 124 in Fee, is equitable as to the fee at Law the
 1. 51 whole is forfeited.
 1. 411
 3. 33
 2. 244
 3. 341.

So an equity of Redemption of any Mortgage
 is equitable as to the fee whether a Mortgage in
 Fee or not. But in case of a Mortgage in
 Fee the Mortgagee has no other than an equi-
 table interest, because there is no reversion.
 But where the Land in Fee and mortgaged
 for years, the reversion in the Mortgagee is
 legal as to the fee, and the Creditor may have just
 title the Heir of the Mortgagee of a fee.
 "quarante accident" is where there is a stay of Ex-
 ecution till the reversion comes into possession.

There is a Contrivance in the authorities
 as to the quality of a fee arising from the
 Sale of Land devised to be sold, tho. not ex-
 pressly for the payment of Debts, whether they
 are legal or equitable. *

According to most of the older Cases Mort-
 gages arising from the Sale of Land devised to
 be sold, or subject to the power of the Creditor to pay
 Debts, is legal as to the fee upon the principle
 that -

that, what comes to him as Eq^{ty} - is all
legal assets, — — — — —

Am. Chy. 130,
2d. Chy. 410,
D. — 450,
1. M^{ts} 420,

Money raised "at supra" by Trustees
is equitable assets by reason of the exclu-
sive jurisdiction of Chy. over proper Trustees.

2. M^{ts} 50,
2d. Chy. 410,
2. M^{ts} 1334.

But it has been held that ^{where} Land is
charged with the payment of Debt & interest D^o — 33
to the Heir; and not devised i. v. when the 2. M^{ts} 293
interest does not pass as Devisee they are
legal assets. And that Stat. ag. fraudulent
Devises has given the Specialty Creditors in
such Cases an action of Debt at Law ag.
the Heir of the Obligor, & not Note 3

3d. Chy. 27,
D. — 33,
2. M^{ts} 293,
3d. Chy. 27,
2d. Chy. 131,
1. M^{ts} 430,
2d. Chy. 410 +

In Conformity with the last rule it has
been held that money arising from a sale
of Land under a power to sell for the
payment of Debt, should be legal assets.
Because the Land descends, the descent not being
broken; but otherwise if the interest pass
by the Devisee.

1. M^{ts} 484,
3d. Chy. 360,
2d. Chy. 430,
1. M^{ts} 430,

This distinction was however exploded or
rather evaded by "Ed Thurlow" who held that
the descent was broken by a power to sell
as much as by a Devisee to sell conveying
the interest by express words

3d. Chy. 435,
D. — 135,
D. 137, 140,
Co. Litt. 110-13,
2. M^{ts} 386

Land descending to an Heir are to be
applied to the payment of Land Debt before
Land

Lands Specifically devised can be taken.

3 M^s 530. This rule is reversed where the Lands are de-
vised for the payment of Debts.

3 Bac. 25. If the Testator charge Debts upon the
Heir and the Creditors resort to the Personal
Estate the Ex^{or} may come upon the Heir for
the amount taken. i. e. where the Testator's
intention is that the Personal Property shall
not be diminished. This rule is distinct
from the former one, where the Personal
Property is taken by the Bond Creditors, and
the Creditors by Simple Contract are allowed
to resort to the Heir, a rule which obtains
where there is a deficiency of Personal Assets.

3 Devins 189. The Heir as before remarked is liable for
Especially Debts to the amount of his assets,
3 Espin^{se} 248. yet the obligee may sue the Ex^{or}.
3 Devins 305. Specially Debts to the amount of his assets,
3 Bac. 25. yet the obligee may sue the Ex^{or}.
3 Devins 303. Specially Debts to the amount of his assets,
3 Bac. 25. yet the obligee may sue the Ex^{or}.
3 Devins 303. Specially Debts to the amount of his assets,
3 Bac. 25. yet the obligee may sue the Ex^{or}.

2 Bac. 443. Ex^{ors} and Adm^{rs} tho. not named are bound
Went^h 117. by the Contracts if they deceased as far as they
Geo. Ch^{as} 189. have assets. unless where from the nature of
Geo. Ch^{as} 553. the Contracts they must be performed if at all
Hylbert^{er} 108. by the Testator in Person.
Dyer 14.

But the Heir is not bound over on the
Special

Special Contracts of the ancestor unless simply named. Because by the old feudal Law no other property than Goods, Chattels and the annual profits of Lands, not the Land itself, was liable to Ex^{or} on the personal Contract of the Tenant and therefore the Heir or rather the Land is not now liable unless made so by express words.

The body of a Debtor was not originally liable to Ex^{or}. And even where the Heir is bound, or rather where the obligation descends with the Land, his body cannot be taken on Ex^{or}. The Ex^{or} is ag^t the Land only.

Howden 44
Hobart 50-
2a 3 329-
3^d 29, 25-
Hut 180
Co. Litt. 103
D^o 290,
Dyer 82, 81-
D^o 207, 315,
Morda 203,

The Land is appraised to the creditor not in fee, but until the issue and profits shall discharge the Debt.

The Land is liable in the hands of the Heir because otherwise the action of Debt allowed at C^o L^o ag^t him would be useless. This is the only instance in which Land could be taken on an Ex^{or} or a personal action at Com^o Law in behalf of the Subject. But the King might always take Lands in Ex^{or} on defect of personal assets.

The Land of the Debtor in his own hands was half of them first made liable to Ex^{or} for Debt by Stat^o of Westminster 2^d 13 Edward 1st.

Howden 439
D^o 441
3^d 325-
D^o 329-
3^d Coke 11:12
Co. Litt. 450,

3^d 329
2^d 435
2^d 3^d 329

The Stat^o granted the writ called "Elegit" the same year the Stat^o "De Mercatoribus" was passed -

paper enabling a Debtor to plead all his
Said by a magnanimous in the nature of a
"Nisi & aduocatus"

2 Bac¹⁰ 329
5 B Com

The person of the Debtor was
first subjected to Ex¹⁰ for Debt by Stat¹⁰ 25
of Edward 3rd which gave a "Capias. ad respon-
dendum" (or satisfactionem).

2 Bac¹⁰ 443
8 Coke 153
10 B 379

Ex¹⁰ are sued on the Contract of
the Debtor only in the "Detinet" and not in
the "Debet" because they are liable only in
respect to property which they have for others
and not in their own right, and they do not
themselves owe

But it has been held that a
charging in the "Debet" and "Detinet" is now
Cited, under the Stat¹⁰ 16 and 17 of Charles 2nd

2 Bac¹⁰ 443
1 Salt¹⁰ 297
1 B Com 503
1 B Com 711
1 M 500
6 B Com 411, 540
6 B Com 325
1 M 186

But where the Ex¹⁰ is a person
liable as he may be in certain cases as for
debt incurred after the death of the Testator
or intestate he may be sued in the "Debet"
and "Detinet" - For here he is charged on his own
debt, the Testator having never been indebted

2 Bac¹⁰ 444
1 R 10003
5 Coke 32
14 B 315
1 R 398

And the same is the rule in the case
of a devassavit (i.e.) after just. obtained agt.
him as Ex¹⁰ "de bonis Testatoris" for he shall not
be charged with a devassavit upon a mere
Surrender

The Heir must be sued in the "Debet"
and

and "detinet" because he has the assent in his Dyer 344
 own right and the Debt depends with the Land, Devins 180
 Charging him however in the "detinet" only will Bro Eliz 712
 be cured by a writ under the Stat^s 16 and 17 of 3 Bae 29a
 Charles 2nd, 5 Coke 30
 D. 440

At C^t the H^{is} could defeat the spe-
 cially Creditors, by aliening the Land before action
 bro. - But if he aliened it after the Writ was
 purchased or a Bill filed in the C^t of H^{is}, the
 Land was liable in the hands of a purchaser the
 just^s having relation to the time of filing the Bill
 or purchasing the Writ

So that the just^s ag^t the
 H^{is} bind the Land by retrospect - It is other 3 Bae 25
 wise however in case of a just^s ag^t the ance^s - Co Litt 102
 too But now by Stat^s 34 of W^m and Mary Carthe 345
 the H^{is} if he alienes before action is liable as 1 Bae 149
 to his own Credit to the Value of the Land sold - 1 Bae 777
 but the Land itself is not liable in the hands 1 Mo 235
 of a bona fide purchaser. In case the H^{is} 1 Bae 325
 alienes after action bro^d, it is a question whether 3 Bae 630
 or the rule stands as at Com Law? - 1 Bae 430

It is holden that the Testator cannot bind 1 Burr 1383
 the Ex^{or} where he is not himself bound, Thus if 2 Bae 443
 A Covenant without Consideration, that his Ex^{or} Bro Eliz 232
 shall pay 10 £ no action will lie ag^t the Ex^{or} Espinasse 177
 for this Sum - This is Note 4

Formerly Lands were not liable 3 Bae 27
 in the hands of the Devisee to be taken by bond 1 Bae 149
 or -

336
336 Creditors. and had the Creditors had no remedy
at Law or in Equity.

But now by Stat³ and 4th of
336² 27 W^m and Mary, Devises of Land and void as ag^t.
18, 4th 325 Good Creditors who may maintain Debt ag^t.
Ex p^{te} 248. the Heir and ag^t. the Devisee or ag^t. them
2336 jointly and it made a question whether the
Devisee can be sued unless the Heir be joined?

A Devisee however for the payment of Debts
336² 27-8 retaining portions for younger Children, is not
18, 4th 430, within the Stat. Such Devises are good and the
D^o 976 Good Creditors cannot defeat them, they are paid
336² 830, at law only like other Creditors "paid passim"

The Heir of an Heir is liable for the
18, 4th 400, Good Debts of the ancestor of the person, of whom
D^o 344 he inherited. But the second Heir is liable
336² 28 in no case I suppose farther than the first
20, 4th 175 had a part and not so far I apprehend unless
he has a part of equal amount himself. Hence,

336² 28 The Ex^{or} or Adm^r of an Heir is clearly not
20^o 395 liable as such for the Good Debts of the Heir's
6, 4th 57 ancestor, Good the Heir himself was liable
2, 4th 62, 75 only in respect of the Land, his person not being
2, 4th 393 charged. But if the Heir should alien the
Romney 200 Land to defeat Creditors, Equity will follow
the money into the hands of the Ex^{or} or Heir

Who may be Executors.

AD

All persons who can make Wills, and many others, may be Ex.^{ors}. Persons of almost all descriptions may be Ex.^{ors}. - Under the feudal Law a "Villain" might be: And now an Infant even "in ventre sa mere", may be an Ex.^{or}. -

Goodell 155
2 B. & A. 375-7
1 Comyns 235
Goodell 134-
Weston 23-
D. - 307.

If a person appoint an Infant "in ventre sa mere", Ex.^{or}, - and the woman be delivered of two or more Children, they are Co-Executors.

2 B. & A. 377
Goodell 102
Weston 233
supra page 200 vol. 1

An Infant cannot act as Ex.^{or}, till he attains the age of 17 years, and an Adm^r must be appointed "curator minoris aetatis", till he attains that age. - The Infant Note 5th.

Goodell 155-
3 B. & A. 131
Weston 213
2 B. & A. 384
5 Coke 28, 281-
Goodell 102
Weston 250,
1 B. & A. 76

Regularly the acts of an Infant Ex.^{or}, under 17, are not binding. Thus he cannot sell the totum Good, or assent to a Legacy, and after he attains the age of 17 his assent to a Legacy will not bind him, unless he has assets more than sufficient to pay the Debt.

2 B. & A. 377
Weston 213-14-7
Goodell 103
1 B. & A. 76
5 Coke 29-
10 B. & A. 258

An Infant Ex.^{or} of the age of 17, is bound by his acts as Ex.^{or}, - if done amounting to the office and duty of an Ex.^{or}, - as if he discharge a Debt or payment, &c.

5 Coke 27
Weston 213-10
D. 309, 310,
2 B. & A. 377
Goodell 430,
1 Comyns 249
1 B. & A. 140,
D. - 852,

But an Infant Ex.^{or} of 17 or more is not bound by any acts to his prejudice: thus if he should give an acquittance or release without receiving payment, it would not bind him.

Weston 285,
1 Comyns 249
2 B. & A. 378
And -

60 Eliz 571 And so if he appoints to a Legatee, and has not
 60 Litt 170 assets to pay the Debts. - You in such Cases
 8 Co 27 were he bound he would be liable on a "deceit
 1 Rolle 730 writ". So if he gives a release for more
 1 Mod 146, than he receives he is not bound as to the Sur-
 plus. - These acts are not done according to
 his office and duty of Ex^r.

16 Henry 249 And Infant Ex^r. - Can in no Case Com-
 11 Hen 328 mit a decessant, till of the age of 21. - And
 1 Fulk 707 therefore if a bond be forfeited, and the Infant
 22 Bar 378 Ex^r release it, on receiving the principal only,
 1 Rolle 730 the release is no bar to an action at Law for
 the penalty.

22 Bar 378 And Infant Ex^r, tho. of the age of 17,
 3 Bar 150 must when sued appear by Guardian, like
 1 Rolle 287 other Infants. or the proceedings will be over-
 1 Popham 130 needless. For he cannot make an Attorney, tho
 2 Palmer 329 record of which is that he has no remedy ag^t an
 60 Jac 420-41 Attorney for mispleading, or (it is said) for neg-
 1 Mod 49 lect. But ag^t the Guardian he has a remedy. -

But if the Infant Ex^r. sue as such
 3 Bar 150 by Attorney, and recover just, it is not wrong
 1 Popham 130 out: for he does in "ante de writ", and the just-
 60 Co 144 is for another's benefit.

And if an Infant Adm^r.
 3 Bar 150 sue by Attorney, it is said to be wrong out, tho,
 22 Bar 180 the just. is in his favour. - This distinction
 result

results from the rule that a person cannot be an Adm^r till he is 21 for he cant take the official oath.

If an Infant and an Adult are both Co^{rs} they may sue by Attorney, for the Adult can appoint one for both, if there -

But if they are & the Infant must appear by Guardian. For an Infant Def^t may be made liable by mispleading to costs, de ^{pro} bonis propriis for this he has no remedy ag^t an Attorney but ag^t his Guardian he has -

But an Infant Def^t is not liable even in cases of Tort. i. e. for costs.

A feme covert may be an Exec^{tr} - Dix. according to the Law of the Spirituall Ch^{rch} is the Canon Law she is considered as a feme sole capable of suing and being sued, and of taking upon her the office of Executrix without her Husb^d and Consent -

And the Civil Law confirms the Spirituall Ch^{rch} in this respect - and therefore if the Husb^d and Consent she cannot act, and if the Spirituall Ch^{rch} attempt to compel her to act a prohibition will be issued.

So also the Wifes Consent is necessary, and she cant be compelled to accept the trust by her Husb^d and Consent ag^t her own Will.

Co. Eliz. 541
Howe 288.

Sug^d 784
3 Bac^d 181
Gaith^r 124
Co. Eliz. 378
1 Mod^d 722
Ed. Ray 232
D^o 600, 1449
Kent^s 112.

2 Bac^d 151
Sug^d 318
3 Mod^d 230
3 Bac^d 1501
1 Roe 282
D^o 287

2 Bac^d 378
Godolphⁿ 110
1 Comyns 235
Whit^t 202
D^o 281-91, 203
3 Bac^d 117

2 Bac^d 378
West 203,

2 Bac^d 378
Godolphⁿ 100
D^o 109-110,
6 Bac^d

But if the Husband actually administers, she is bound by his acts & cannot plead, "ne unguet" -

So if the Wife administers without his consent, and an action be brought against them, they are estopped pleading that she never was Executrix.

If a feme sole be appointed Ex^{tr} and many before she intermeddled with the Estate, and the Husband administers this is such an acceptance as will bind her, and she can never afterwards refuse it. This rule probably supposes the Wife not to have refused.

At Feme Court it is said may without her Husband's consent make a Will or rather Testament of such Goods as she has as Executrix. -

On the other hand it is asserted by some that the Husband's consent either before or afterwards is necessary. But it be **NOTE** -

But it seems to be a point not disputed, that she may appoint an Ex^{or} of the Testator's Goods which is much the same, for the Ex^{tr} as such will have the disposal of the Testator's Goods. The thing may be an Ex^{or}, and

he may nominate others to take upon them the execution of the Trust who may be sued at the representation

representatives of the deceased. — — — — — Joseph, 75

A Corporation aggregated cannot be an Ex, because 1st It is a body formed for special purposes and 2nd It can't take the oath for the purpose of the Will. The second is the substantial objection for which see the three last authorities cited — and the Note 7th

1 Comyns 238
Edw. 3 53
2 Baco 375
West 17, 25
Rolls 915
Joseph 85
2 Baco 375
West 17
D. — 25

According to the Civil and Canon Law, Apostates, Traitors, Outlaws, Heretics and others could not be Ex^{rs}. By the English Law no person is disabled from being Ex^r by public offences agt the Civil Law, thus Outlaws, and persons attainted may be Ex^{rs} because they sue in "ante deict". Yet they can't make Wills for their Goods are forfeited

2 Baco 375
Co Litt 128
Rolls 914
Hord 184
Joseph 85
West 17
Hord 201

Persons excommunicated cannot be Ex^{rs} for being excluded from the Church it was supposed that they could not dispose of the Goods of the deceased in "post deict". This is the only instance in the English Law which arises "ex delicto".

2 Baco 375
Co Litt 134
Joseph 85

An alien enemy may be an Ex^r or Adm^r. He may have the Administration that is the disposition of Leases, as well as moveables because he holds "ex ante deict".

1 Comyns 235
Co Litt 81
West 17
D. — 22

But it is otherwise by the Civil Law, except in military Testaments, which are governed by the "jus gentium". — — — — — P. is

Joseph 85
West 417
West 417

2 Bac 375-8 It is a question whether an alien enemy
 Geo. Ely 142 can maintain an action as Ex^r? It seems
 D^r 583 to be conceded that he may hold the estate,
 Mod^r 431 and by the weight of authority he may sue -
 Skinner 370 Note 8 - The p^rogative -
 2 Bac 370 Idiots and Lunatics are incapable of
 Goodrich 86 being Ex^r, for they can't execute the trust, nor
 ever determined to undertake it.

2 Bac 370 So if an Ex^r becomes "non compos" Admin^{str}
 Salke 36. administration may be committed to another.

2 Bac 370 The p^rogative Ch^{cy} cannot refuse to grant
 Gauthier 457 Administration to any person because
 Salke 36 he is poor or insolvent, for he derives his au-
 D^r 299 thority from the Testator.
 2 Bac 361
 Salke 25.

Now can the p^rogative be in the spirit
 Supra and Ch^{cy} demand Caution, (Security) since the
 Testator required none.

2 Bac 377 But Ch^{cy} considering them as Trustees,
 Gauthier 458 will compel them like all other Trustees to give
 1 Show 294 Security if insolvent.

2 Ver 249 So when the Ex^r who is not insolvent
 2 Bac 377 is wasting the estate, Ch^{cy} will compel him
 Ch^{cy} Ep. 171 to give Security.

So upon a suggestion of insolvency in
 2 Bac 377 the Ex^r Ch^{cy} will order the Debts of the
 1 Ch^{cy} Ep. 171 decedent not to pay him "pendente lite".
 Who -

Who may be Administrators. —

All persons not legally disqualified, may be Administrators, vide 12 Mod^o 194, D^o 501, Enslap 5, Garth 446, 3 Mod^o 121, Talbot 39, 2 Bac, 381, 20 May 338, 3 Mod^o 395

A person can't act as Adm^r, till the age of 21. — For before that age he can't give bonds to the ordinary, which every Adm^r must do. * Note 9

The right of administration may devolve on the next of kin he being an Infant, but he can't administer until he is 21. It seems proper then to say that an Infant can't be Administrator, till Administration is granted by the ordinary. — The case of *and Ex^{or}* under it is different. For he is Ex^{or} by the appointment of the Testator, 23 Bac 381, 5 Coke 29.

A Feme Covert may, I conceive with the Consent of her Husband, be an Administrator. How clearly she may be entitled as next of kin, and I find no disqualification in her case any more than in the case of an Infant — It is, inferable also, from a rule laid down by Judge Keene, — that a Feme Covert is commonly postponed to others of equal degree. It is also holden in some of the Books that she may be an Adm^r. — Romyns 202, D^o 249, 2 Bac 413.

If a Feme sole Ex^{or} — in a will, her Husband is liable during Coverture for her acts committed — 1 Bac 273, Co. Cha^o 208, D^o 227, 1158.

72
Cro Cha 503 Committed before even if they amount to a 'no
1 Rolle 351 vast sum."
More 701

1320 293 At Law, the Husband is liable only dur-
ing Coverture; but in Equity the Cr^{ts} may
104 of 80 follow the wife into the hands of the Hub-
1820 309 band, and if he dies even into the hands of his
242 61 Ex^{rs}. The question here arises may not the
Q^o - 118, Regaltes, and next of kin pursue the affairs,
also in Equity? Judge Hall thinks they might.

"Corporations" aggregated cannot be Adm^{rs},
for they cannot take the necessary oath, to dis-
- infra - charge the duties of Administration. But Cor-
porations sole may be Adm^{rs}, as in the
Law of Ex^{rs}.

Quesada 85, An excommunicated person cannot
2 Bac 375 be an Adm^r, for he cannot dispose of the Goods
Co Litt 134 to pious uses.

- 3 Bac 372-3- An Adm^r may be an Adm^{tr}. -
Co Litt 128, for as he acts, "in and by right" he may sue -

1820 184 And the Case is the same if presumed
Holt 914 with a Tolon, attainted, for as in Executors he
2 Bac 375 he sues in another's right -
Went 17

So an Alien may be Adm^{tr}, as well as Ex^{or}.

Cro Cha 142 The same question arises as to an Alien
Q^o - 583, namely, as in the case of Ex^{or}.

Quesada 80, Idiots and Lunatics cannot be Adm^{rs}.

The

The origin of Administrators. -

It has been said that Administration, belonged originally to the Spirituals, & Judge Keen thinks so.

1 Lewis 158
D^o - 159
D^o - 180
Salk^r 37.
2 Bac^o 397.
9 Coke 38.
2 Bac^o 397.
2 Bl^o.

According to other Books the thing was entailed by the old Law to descend upon the Goods of all Intestates and dispose of them as "Parents Patria" and Geo^d Trustees.

According to Selden, the Intestates Goods (i.e.) the Care and disposal of them belonged to the Lord of the Manor.

1 Conyns 257.
2 Bac^o 397.

The jurisdiction of Ecclesiastics in testamentary matters, and those of Administration is said to have commenced in the time of Rich^d 1st and 2nd. Afterwards it seems the Crown inserted the Prelates with this branch of the prerogative, except so far as it had been previously granted, as a franchise to the Lords of the Manors.

1 Conyns 257
Rich^d 1st 480
1 Ry. Op. 206
9 Coke 37
2 Bl^o 495.

The Bishops in exercising this authority, disposed of the Goods of the Intestates, to pious uses, and took their trusts. -

Finch. 173.
2 Howes 277.
2 Bl^o 494.

This power of the ordinary drew after it that of Probate of Wills, it being the reasonable that the Will should be proved before him whose right of distributing the Goods of the deceased, was superseded by it.

2 Bl^o 495.

The ordinary not being accountable to any one

and did as he pleased with the whole that remained after deducting the "rationales partes" i.e. the two thirds of the Widow, and Children. Now during the early periods of the feudal system in England a man leaving a Wife and Children could bequeath only one third of his goods and chattels, and Administration extended no further. If he had no Wife or Children he could bequeath the whole, and Administration was coextensive with the right of disposal. The ordinary was not bound to pay even the Debts of the Testator. But when a Will was made the Ex^r was always bound to pay the Debts of the Testator, to the extent of the assets.

When the Law stood thus the ordinary disposed of the goods of the Testator in person and did not appoint others.

The first check given to the power of the ordinary was by Stat of Westminster 2^d c. 13 Edward 1st. This Stat^e compelled the ordinary to pay the Debts of the Testator to the extent of a fourth of Ex^r were before obliged to do. This Stat^e gave a direction against them.

It has been holden on said Stat^e that this Stat^e is in affirmance of the C. L. - But let it be asked in affirmance of what C. L. and where is it to be found?

The Stat of Westminster 2^d c. 13 c. 13

2^d Edw. 1st c. 13
2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

2^d Edw. 1st c. 13

the surplus after the payment of Debts at the disposal of the ordinary,

The abuse of the remaining power occasioned another interposition of the Legislature, and the Stat^o 31st of Edward 3rd - was made enacting that in case of intestacy the ordinary should distribute the next of kin, and next lawful friend to be administered &c

This Stat^o is the origin of ^{his} ~~the~~ officers of the ordinary, persons appointed by the prerogative of the Pope to represent the Universal Church in the possession of property &c.

Therefore at C.E. no Administration exist - as appears before by the Stat^o ordinaries began to appoint others to act in their stead, but they did not sue, nor would they sue, being more Solicitors or Attorneys of the ordinaries

This Stat^o enabled ^{his} ~~the~~ appointed under it to sue for the recovery of Debts and to who be treated as ^{Ex^{ors}} - might and subjected them to actions by Creditors, as ^{Ex^{ors}} were before subjected and at the ordinary was by Stat^o Westminster 13 Edward 1st That this Stat^o does not oblige ^{the} ~~the~~ to distribute the surplus after paying the Debts, it says nothing about it.

Whomsoever grant Administration. Wherever the right of passing a Will, and -

23rd 308 of Administration may have originally resided the
 D^r 402 right of granting Administration and Probate
 24th 405-61 by Will and clearly belongs except in certain
 D^r 491 Cases to the Spiritual C^o. And should Note 10.
 18th 359
 Salk^o 37.

It has been said that the King is the
 sole page 75-9 supreme ordinary of the Kingdom and as such
 may grant letters of Administration but this
 right of the King has since been denied. —

23rd 399 Yet if a person is ^{having no issue} intestate, the Court
 Salk^o 37 and is for the King to grant letters patent
 24th 585 and the ordinary admits the patented to Ad-
 25th 33 ministration. This admission is however said
 25th 36 not to be "de jure" but from Courtesy or respect.

The ordinary may in such Case sit
 23rd 402 as one of the Judges in "first instance" for he is
 24th 43 not obliged (I suppose) to appoint an Ass^r,
 Salk^o 41 as in the Case of a bastard intestate. The
 Note 11 Thing according to usage is entitled to his Goods

In certain Cases the (14) Barons have by
 24th 38 innumerable usage the right to grant Ad-
 24th 355 ministration, to prove Wills, but in no other
 25th 35 way. In Conn^y and Ass^y in a right
 24th 400 Waning Title in which the Intestate's Salk
 154 D^r 677 may sue to recover his effects. It is however
 24th 400 otherwise in England. But is not our rule
 24th 400 agreed to in principle? J. Gould W^{ro}

97
Who are entitled to Administration.

By Stat 31st of Edward 3rd, the ordinary is bound to grant Adminⁿ to the next & next lawful friend of the Intestate: and those words have been construed to mean the next of blood who are under no disability.

Yet it seems to have been always held that the Husband under this Stat^{ute} was entitled to the Adminⁿ of his Wifes Estate, -

But was the Wife entitled to Administration in the Husbands Estate? According to one Case it appears that she was, and this to the exclusion of the Husbands kindred.

It should seem several next friends, (i.e.) friends in equal degree, the ordinary might perhaps elect the most fit of them.

The power of the ordinary was enlarged by Stat 31st of Henry 8th which allows him to grant administration to the Widow, or next of kin, or both, and when two or more are in the same degree gives the power to appoint which he pleases. Next friends, and next of kin seem to have been synonymous except that the Husband and the Widow were included in the first words.

This Stat^{ute}

Lovelace 2
P. Wm 381
West 219
2 R.
 This Stat seems to have been considered as in some measure explanatory of 31st of Edward 3rd tho. it gave the Power of having the next of kin preferred to the Wife or joining them. But the Stat^s together are the basis of the Law on this Subject.

2 R.
P. Wm 477
3 Coke 135
Joseph 253
1 Lewis 233
 This Stat^e says not I am to give the Adminⁿ istration to the Husband or the Wife or both; but he has always been entitled to it; *John Am.* were not allowed to distribute to the kindred of the deceased who there has been some ^{the} Controversy on this point.
 Note 12

4 vol 1 page 159
 But now by the Stat^s 22 & 23rd of Charles 2nd Am^{ts} are obliged to distribute; yet the Husband's Amⁿ of the Wife are by the Stat^e 29th of Charles 2nd declared not to be within the Stat^e of Distributions. Note 13.

Lovelace 123
3 M. 520
1 P. Wm 381
2 R.
 If the Husband dies before Adminⁿ istration taken his representatives i. e. his Ex^r or Amⁿ will be entitled in Equity to the Adminⁿ istration of his Wife's Estate to the exclusion of the next of kin, and the ordinary. *Lovelace* says is Compellable to grant it. The Husband is even called next of kin in two Cases.

Lovelace 2
3 Salk 21
 If a Wife Ex^r die Adminⁿ istration of the Goods which she has as Ex^r can not be to the Husband but to the next of kin to her Husband.

334

By the Stat^s 31 of Edward 3. and 21 Henry 8. - *Lovell 3*
the ordinary is Compellable to grant Admin- *Salk. 30*
istration. Of the Husbands effect to the widow *Lug. 552*
or next of kin. but he may grant to either *Comyns 201*
of them or both at his election - *Ray 93*
1 Vern 315.
1 Showa 351.

When the intestate leaves no Wife Admin- *Ray 498.*
istration goes to the next of kin: among kin *Lovell 4*
and those in the nearest degree are preferred *Comyns 201*
but of those in equal degree the ordinary may *Salk. 38.*
take which he chooses. This is a rule to *234.*
which there are no exceptions, *1 Rolle 908*

Administration when granted to two or *Lovell 4*
more may always be joint and sometimes *Roller 908*
several. Several Administrations may be *1 Showa 351.*
granted of separate parts of the Goods, &c.

That the Administration of one part may *Lovell 4*
be granted to the Wife and another to the *Salk. 30.*
next of kin, as Children, Brothers, Parents &c. &c. *1 Sid 100*
But if an entire thing as a Bond for a *Sum Certain.* Several Administrations cannot
be granted. If two be appointed the appoint-
ment must be joint.

The degrees of kindred are computed now - *286*
viz to the Civil not according to the Canon *2 Vern 125*
or Common Law. Therefore Children are pre- *2 Bac 115*
ferred to Parents. For according to the Civil Law *Lovell 4*
the.

Joseph 253. the Comptrolia is from the deceased, as 'born' in a year and does not exceed among ^{colleagues} ~~Cham~~ outs but upon defect of Children tho. both are in equal degree.

Dec 27

1. ^{Self} 41 view, 2. Parents 3. Brothers & 4. ^{Sister} Grand Parents.
3. ^{Self} 702 He Females are entitled equally with Males

3. 105° 752 He Females are entitled equally with Males
 100° - 452 in the same degree. In computing the degree
 512 74 ^{of propriety &} propriety, not quantity of blood is regarded.
 236
 Vent^s 310. Therefore the half blood is equally entitled with
 Q^s 329. 435, the whole blood.

to the claims of next of kin or
next friend as Son and Daughter, Brother, and
Sister, be extended to their representatives, so that
representations as such will exclude more
distant relations than their Parents? —

The Stat^o do not I believe mention representation, nor do the Books generally. But it seems according to one authority, that under the Stat^o 31st Edward 3.^d the Right of representation was obtained, as under the Stat^o of Disturbances -

The order under the 31st of Edward 3.rd
is said to have been, 1st Husband and Wife -
May 4987 2nd Children and their representatives. 3rd Parents.
4th Brothers and Sisters, and their representatives.
- but I am not sure as to representatives -

none

If none of these Characters. i.e. Husband and Wife or next of kin will accept a Creditor Salk 387-
may be, Custom be sh^o. In England he is 2 BR. Lovell 84-
the next Claimant

If there be no Husband Wife or next Salk 37,
of kin the King appoints according to usage Lovell 4.5.
or rather recommends and the ordinary ap-
points of Course.

If an Ex^{or} refuses to act or is inter-
d^o leaving Godd^o und^o ministered. Administration
must be granted. But in this Case the 1 Kent 219
Stat^o 31^o of Edward 3^o does not govern the ordi^o Stat^o 281
way - He may grant Administration to the 2 BR 386
residuary Legate upon the presumption that 2 BR
the Testator meant to prefer him to the next
of kin. But here such a presumption does not
exist - for the residuum is given to another.
The Stat^o of Henry 8^o requires it to be given
to the next of kin.

But may the ordinary appoint
any other than the residuary Legate unless Stat^o 550?
he be disqualified? This is a doubtful Q^o 955
Doubt: but it seems not for the reasons just-
given, tho. it is sometimes said he may.

If a Testator died intestate as to part i.e. 2 BR 386
no residuary Legate being appointed the next Dyer 372
of kin would I presume be entitled, for as I have sh^o
to this -

Godolph 230, to this part the Case does not differ from the
Common Case of intestacy.

If a residuary Legatee when entitled
to Administration, "ut supra", also vid. *Godolph 230*, next of kin and not the Testator, must have
the Administration, tho. "Godolphin". Speaks only
of an Ex^r who is universal or residuary Legatee,

on default of all these Characters, the
ordinary may grant Administration as he
pleases, as he might have done before the
Stat 31th of Edward 3^d.

The person thus appointed may now
it seems be a proper Adv^{ty}, tho. before the
Stat 31th of Edward 3^d he was only an attorney
or servant to the ordinary. — Or in the above
Case the ordinary may grant Letters to such
person to collect the goods of the deceased: that
don't make him Adv^{ty}, but a kind of Bailiff
or Trustee, to gather and keep the goods safely
and do some other acts.

When an Adv^{ty} is made more abate
of an Infant is to be appointed, the ordinary is
not bound by the Stat. on the subject for he is
but a "Curator", for the Infant, and has no
interest nor Benefic^t, but in right of the Infant
He therefore is not obliged to appoint the next
of kin to the Testator or Infant. See Statutes
21st Henry 5th and 31st of Edward 3^d.

If a person named Ex^{or} do not appear before the ordinary or being summoned to accept or refuse he is excommunicated. —

2 Bar^{on} 1103-5
Godolp 160140-
2 Shewp 252
West^{on} 391
Note 14-

Of transmitting this Trust of Ex^{or} to
H^{on} Adm^{or}, die his Ex^{or} and not Adm^{or} to the
intestate. Administration must be committed
anew & de bonis non.

Goodell 5
West^{on} 14
2 Bar^{on} 385-6
2 R. R.

The Adm^{or} can sue the trust-
reposed in him to another, because he has no
interest except what he derives from the ord^{inary}.
The Trust results therefore to the ordinary.

So if an Adm^{or} die his Adm^{or} is not Adm^{or}
to the first intestate for there is no priority
between the second Adm^{or} and the first inter-
tate. A new Adm^{or} must be ap-
pointed on his Estate. Hence the second Adm^{or}
is appointed to administer the effects of the first
Adm^{or} only, not those of the first. Therefore its ac-
cession to continue administration a fresh, of the
goods not administered by the Adm^{or} of the first
Adm^{or}.

But the Ex^{or} of a Ex^{or} the latter
having proved the Will is Ex^{or} of a Ex^{or}. For
the power of the Ex^{or} is founded on the ap-
pointment of the decedent, and this appoint-
ment is founded on a special confidence
in the Ex^{or}. He may therefore transmit

Comps 281
1 R. R. 400,
2 Bar^{on} 179
2 Goodell 278
Rolle 99.

it to any one in whom he has equal confidence
 as, after he has proved the Will.

2 Bac 405

Salk 381. Ex^{or} A and B, and A dies leaving C. This.

Falck 127 Ex^{or} C is not Ex^{or} to John Stiles. During

1 Comyns 251. B dies the whole authority survives to him.

2 Bac

But if after A's death, B dies leaving
 D his Ex^{or}, D is Ex^{or} to John Stiles.

1 Comyns 251

Goodcph 230

5 Coke 9. representation of A; - for they are strangers

2 Bac 385. there is no privity between them.

8 Anglin 182

Proce 907. The Court is commissioned to administer
 the goods of A, Ex^{or}, and not those of A the
 original Testator.

2 Bac 386

Proce 907. Cum testamentis annexo must be granted, of
 which hereafter.

2 Bac 381

Proce 907. If A dies leaving B his Ex^{or}, and A dies leav-
 ing C, an infant, Ex^{or}, and Administration, "
 Curavit minor alicui," of B be granted to C
 C is not the representative of A.

Salk 228

Proce 908

2 Bac

Whenever therefore the Court is represented
 from Ex^{or} to Ex^{or}, is interrupted by any one
 Administration and all the goods are not
 administered. Administration must be granted
 anew, -

And

Will ought to be made known to the proper officer within four months of the death of the Testator.

There are two modes of proving a Will 1st In Common form where the Ex^r presents the Will without citing the parties interested, and deposes himself that it is the true, whole, and last Will of the Testator, and the Judge upon this proves it. 2^d In form of Law (i.e.) when the Widow and next of kin are cited, to be present and witnesses are examined

When an Ex^r proves a Will in Common form, he may be compelled to prove it again and in form of Law; but it is otherwise where the first probate is in form of Law. —

The probate of a Will in Common form may be questioned at any time within the 30. days next after: but not when proved in form of Law.

Executors Refusal

The office of an Ex^r being private, and he being named by the Testator, not appointed by Law, he may refuse to accept the executorship in the first instance, and then Administration "Cum testamento annexo" must be granted.

But it is said that the ordinary may compel the Ex^r to prove the Will, and to make his election to accept or refuse the executorship, —

tho. he cannot direct his choice is he cannot
compel him to accept

But an Ex^r can't assign his office
it being fiduciary. nor can he refuse by any act
"in pais" - as by a declaration out of Ct. that he
will not accept - i.e. this alone won't bind him.

2 Bac^r 408
2 Thoson 252
Cro Eliz - 92
Went 37
1 Mod^r 272

In a case in "Cro Eliz" - however where the Ex^r
refused, the record was only that he refused to
accept, yet that remuneration was held binding

2 Bac^r 405
Vaughan 144
Holt 907
Hoson 281

If there be but one Ex^r, and he refuses
Administration "Cum testamentis annexis" must be
granted, and the Ex^r can never afterwards prove
the Will, or act otherwise as Ex^r. But maybe
waive his refusal and prove the Will before
Administration granted, & he may, in last auth^y

But if one of two Ex^{rs} renounces before
the ordinary, and the other proves the Will, the
first may administer at any time afterwards
even after the death of his Co-Executor. For
the executorship survives, and he is preferred to
any Ex^r of his Co-Ex^r. for as the Will is proved
the Ct. has no right or authority to take the
refusal during the life of him that proved
it tho. he may afterwards. Since probate by
one Ex^r entitles all to act.

Co Litt^r 292
5 Coke 28
9 D^r 37
Salk 31. 311.
2 Bac^r 408
1 Mod^r 273
Dyer, 100
Hardf. 111.
7 Mod^r 39
12 W^m 251
Salk 307.

But according to the Civil Law the
remuneration is compulsory, and continues.

30 W^m 251
5 Coke 28
9 Coke 37
Salk 311

So -

So the Ex^r. refusing in the last case may
 Credit 29, release Debts due to the Testator,

So the Ex^r. who refuses must be warned
 9 Coke 37^a in every action br. by the rest. * But it is other
 Salk^r 207 wise when the action is to br. ag^t. the Ex^r. & is said
 45 Rep^r 565 the Jst. in such case is not supposed to know
 2 Burr 881. that any other persons are Ex^{rs}. than those who
 D^r 390. act as such. - of which hereafter. -

* Judge Keene knows no reason for this, usage has allowed it in Court.
 2 Blev^r 408. after an Ex^r. has administered the estate
 Godolph^r 141 renounced. so by the act of administering he
 2 Jones 72 accepts the executorship which determines his
 2 Wood 142 right of election. and makes him liable to suit,
 1 Vent^r 303
 Went^r 38
 2 Lewis 182

It is a Gen^l. rule. that whatever the Ex^r.
 2 Blev^r 400 does with the assets of the Testator which shew
 1 Rolle 917 an intention in him to accept the office, amounts
 1 Dyce 100. to an administration so that he can afterwards
 renounce.

So also any act which makes one
 1 Rolle 917 an Ex^r. "do some work" is an administration, and
 Went^r 3409. is deemed an election of Executorship, as E^x. the
 2 Blev^r 400. taking possession of the Testator's Goods, and Com-
 1 Dyce 100. mencing them to the Ex^{rs}. use
 Anderson 11

So taking the goods of a Stranger and
 1 Rolle 917 administering them under an appointment
 2 Blev^r 400. that they, all the Testator, amounts to the same
 thing. yet it would not if he should take the
 Testator's Goods claiming them to be his own.
 So -

So if he recovers it is due to the Testator or
relates thereof.

2 Bads - 400
Med - 19
Pensions 11

So also if there be two Ex^{rs} and one
without Consent of the other takes possession of
a specific article bequeathed to him by the
Testator, this is an administration - & a Legatee
can take his Legacy without the Consent of his Ex^r,

2 Bads 400
Ruler 97.

But in these cases if the Judge knowing
that the Ex^r has administered will not interfere
except his refusal, and grant administration to
another, the grant is good and the Ex^r can after-
wards resume the office.

I have
Went - 401

Yet if after administration granted only
because the Ex^r does not appear on Summons
to prove the Will, the Ex^r chooses to accept
he may do it, and administration must be
repeated.

2 Bads 400
Went 401.

And if after the Ex^r has refused and
administration is granted to another. He appears
to the Judge that the Ex^r has administered be-
fore refusal. He may, I suppose repeal the
administration, and oblige the Ex^r to accept.

2 Bads 400
Went 401.

If the Ex^r appears and takes the usual
oath that he will justly execute the office
he cannot afterwards renounce it, for he has
by the oath accepted. Nor can the ordinary
refuse to admit him, tho, after taking the oath he
had refused. If he has a mandamus license -

2 Bads 400
Ed. King 303
Do - 403
Went 335

The

less value than the rest - He must renounce *Apportion 103*,
in toto if at all, and the same rule I suppose
 must obtain in case of Administration grants -
 is generally

2^d It was formerly doubted whether
 Administration could be granted to one during
 the absence of the Ex^r out of the realm -
 But it is now settled that it may.

6 Mod^o 304
 1 Comyns 283
 4 Mod^o 1415
 Talk^r - 42
 Lovell^o - 192
 2 Bac^o 416
 2 Roys 1071
 2 Bac^o 415
 3 Talk^r - 23
 1 Rolle, 908

3^d The same is the rule when the rightful
 Adm^r is out of the realm

So a temporary Adm^r may be granted
 while the rightful Adm^r is outlawed or in
 prison. *see 2 Bacon's Titles Abolishment & Outlawry*

Co Litt^r, 128
 2 Bac^o 375

But why should it be granted in the case
 of outlawry when an outlaw may be sued
 as Ex^r or Adm^r? This Administration ceases
 when the absence, imprisonment &c of the
 rightful Ex^r and Adm^r is removed.

4th So it may be granted "pendente lite" of
 a Will. so clear when it is decided. *Appt 25th Nov 69*
 it was formerly doubted whether Adm^r could
 be granted in this case.

1 Comyns 283
 17
 25th Nov 69
 25th Nov 69

5th So if there be a dispute about the
 right of Administration it may be granted
 "pendente lite."

1 Comyns 263
 253

These temporary Adm^{rs} are
 liable of being, and liable to be sued, while
 they

1 Comyns 263
 17
 1071

28th was by their authority. Continues: even *Admⁱⁿ per seculo liti*
 28th 415.

28th 386 6th If the Ex^r named refuse: Administration
 Salk 304-5. *Cum testamento annexo* is to be granted
 9 Coke 37th and not *Admⁱⁿ "de bonis non"*. For none of the
 Q^o - 40. Goods are administered.

28th 386 7th So if the Ex^r die before probate - in
 Salk 304-5. immediate Administration is granted, "*Cum*
Testamento annexo."

28th 386 8th If the Ex^r having actually Admin
 Salk 304-5. inter. die before probate an immediate ad-
 ministration is granted. "*Cum testamento*
annexo." because he died before he undertook
 the execution of the Will.

11th 388 9th So if one make a Will, and name
 28th 385. no Ex^r. - an immediate Administration "*Cum*
 28th 907 *testamento annexo*" is granted: But if an
 28th. *Admⁱⁿ* die leaving goods unadministered, Admin-
 istration "*de bonis non*" is then granted.

28th 386. So if the Ex^r die intestate, after pro-
 viding the Will. Administration "*de bonis non*"
 Salk 304-5. "*Cum testamento annexo*" - is granted.

28th 415. By the old rule of Law if the original
 28th 386. Ex^r or *Admⁱⁿ* have lost an inter. and recover
 28th 33. ed judg^t and died without taking out Ex^r.
 28th 140. the *Admⁱⁿ* "*de bonis non*" could not sue it out
 28th 29. nor in any way take advantage of the judg^t
 28th 290. he not being plaintiff to it.
 Salk 322-3. 28th
 28th 1072.

But now by the Stat. 17 Charles 1st and
1st of James 1st the Stat. de bonis mort. may
have a Scire Facias and the Judge shall make good
is rendered as a verdict * When the Ex^r in * Note 15
that can be interested. the Executor is dead
to die intestate.

An Act^{to} "de bonis mort." is entitled
to all the personal property of the deceased which
remains not administered. and in specie. as
lands. houses and furniture be be

2 Bae 380
Salk 306
Hamm 143
D 243
Hamm 473
2 Bae 302
Holt 386

So too Money received by the original Ex^r
as such and kept by itself, for it can be iden-
tified. So too Debts due to the original Executor
But if the original Ex^r takes a Note for a
Debt, due to the Executor, the acceptance of the
note is such an alteration of the property
that the Note debt is the representative of
the Executor, and not in the Stat. "de bonis
mort." Judge Keble thinks can be supported on principle

10. If the Ex^r is under the age of 17
Stat. "durante minore etate" must be granted.
is till he attain the age of 17.

Godolph 102
Comps 258
Dof 258
5 Co 29
2 Bae 280
Lovelock 192
Went 304
3 Moo 24

So if the person entitled to administration
be an Infant administration "durante minore
etate" that is till he attains full age. must be
granted.

This Stat. "durante minore etate" be-
ing going out a Curator for the Infant the
ordinary.

2 Bae 381
5 Moo 340
Comps 258
D 258. 261. 159

Skinner 153.
Salk 39.
Goulds. 163

Ordinary may appoint whom he pleases.

It is said now that Adm^{ty} granted during
28 Dec 381 the minority of an Infant Ex^{ty} under 17. determines
Skinner 153 on her marriage, with a person of full age, as
Hob. 250. he becomes entitled with her in her right, as
1 Comyns 250. Executing and is of age is act.
3 Coke 26.
3 B. & W. 419. But this is denied to be Law by some au-
thorities as in the margin.

Goulds. 113.
Hob. 259-00

If an Infant and a person of full age. be
Ex^{ty} administration "orante minore state" is
not granted to a third person; for the one of
full age may execute the Will and Admin-
istration to a third person is void.

28 Dec 381
2 Lewis 340.
D. 239
D. Ch. 140.

That it is said that the Ex^{ty} of full
age may take Adm^{ty} "orante minore state"
and survive as such or as Ex^{ty}.

So if two Infants be Ex^{ty} one of them, the
Goulds. 113. age of 17, and the other under the former may
execute the Will and Administration, "orante
minore state" is not to be granted.

In this case I conclude that the above Ex^{ty}
can't take Adm^{ty} "orante minore state", for no
person but an Adult can be an Adm^{ty}.

If I die leaving A his Ex^{ty}, and A die
28 Dec 381 leaving B. an Infant his Ex^{ty}, and C be appointed
Goulds. 113. Administrator "orante minore state" of B. C
is not

It is not the representation of J. F. the. He acts for B who is his Ex^r. There must be an Ex^r. - George 230, "durante minore aetate." for John Stiles.

The authority of an Administrator "durante minore aetate." of an infant Ex^r or Adm^r.

It is said in "Comyns" (who however cites, 1 Comyns 250 no authority to the point), that an Adm^r. "durante minore aetate." is not entitled to Administration. 1 Rolle 910.

But it seems to be established that an Adm^r. has for the time all the powers of an absolute Adm^r. Note 10

But it seems to be established that an Adm^r. "durante minore aetate." has not such a *quasi* power only in the effects of the deceased, as an absolute Adm^r. has. For his authority is *quasi* given to him. "ad Commodum & profectum executoris." 2 Brod 381. 5 Coke 29. Geo Eliz 718. 1 Comyns 250. 2 Deane 103. 2 Levin 163. So that he is in the nature of a Bailiff, to the Infant Ex^r or Adm^r. These authorities relate to the case of an Infant Ex^r or Adm^r. "durante minore aetate." of an Infant entitled to Administration.

The authority of an Adm^r. "durante minore aetate." is *quasi* granted "pro bono, & Commodum, Executoris," but not always. Yet tho. his authority be special he may, *quasi*, do all acts which are incumbent on an Ex^r, and which are in legal presumption for the advantage of the Infant, and of the estate of the deceased. - Thus he may assent to a Legacy of three or other a fund sufficient to pay the Debt (but not otherwise). - An Ex^r.

- 2nd Baco 1130.
3rd 487.
- 2nd Baco 330-2.
1 Comyns 250.
5 Coke 87.
5 Coke 29.
5 Coke 119.
2 Deane 103.
2nd Baco 278.
2nd Baco 381.
1 Comyns 250.
2nd Baco 381.
1 Comyns 250.

An Ex^{or} may speak under any Circumstances
as to, at his place.

To be may sue and be sued.

That as he can do nothing to the prejudice
of us before he can't sell the goods of the deceased
except for the payment of debts which is a case
of necessity, or unless there are provisions in which
case a Bailiff may, &c.

He cannot make a lease of a term vested
in the Ex^{or} or Adm^r.

There is an exception to this rule when
the Administration "durante minore etate" is
granted ^{per} ^{se} it is not "ad Commodum" like -

How he may lease a term vested in the Ex^{or}.
He may attain the age of 17.

But it was laid down that the Adm^r even in
this case may not sell the goods of the deceased
except to pay debts &c.

Repeal of Administration.

1 Comyns 203.
1st Df 179.
1st Hble 883.
6 Co 40.
Ray 93.

It was formerly holden in some opinions that the
Ordinary could not in any case repeal letters of
Adm^r - he having executed his power.

2nd Baco 1110.
Dowdell 18.19.
Dowdell 87.
Dowdell 18.
Dowdell 47.
Hble 907.

But it is now clearly settled that it may
be repealed for various causes, the most arbitrary.

1st When unduly obtained, This happens, 1st
If Administration be granted on the ground of sup-
posed intestacy, when there is a valid Will. here

Adm^r

Administration must be repeated. -

2nd - When in Case of actual intestacy, Admⁿ is granted to one not legally entitled to it. Here as probate of the Will Admⁿ must be repeated.

Source 18.19
3 Salk 22
1 Comyns 203
1 Salk 409
Salk 38
3 Levin 50
1 Kent 128

So if granted to a Stranger, when there are heirs not disqualified; and so if granted to the next of kin, cum Testamento annexo when there is a residuary Legatee.

3rd When obtained by force or suggestion or any kind of fraud, it may be repeated.

1 Salk 370
2 Salk 410
1 Salk 293
1 Hble 63
D. 70
Harg 911
Goodell 19

So when obtained by duress upon the ordinary, as if he granted Administration upon a wrong suggestion tho, probably not on a fraudulent one.

4th So if it be obtained in an irregular manner; as without citing the parties required by Law to be cited.

1 Comyns 203
1 Leqq 305
4 B. & W. ecclesiastical
Law - 300

So if obtained without giving Security to account for; or be taken out within 14 days or as it is said in "Hble" 15.

2 B. & W. 410
2 Hble 64

So if after Administration granted when one be obtained without a repeal of the first and the first release his Administration, the second must be repeated, and the release is void.

1 Comyns 204
Dyer 309
6 Coke 19

III Administration duly obtained, may be released in consequence of matter of "pross" & "dis" -

1 Comyns 203
1 Levin 158

18 Df 373 If the original Adm^r should become a lunatic, or otherwise incapable of administering. -

Goodell 18.19 So if the person legally entitled, be incapable of administering. -
4 Burr 645. -
Saw 230. he for this reason granted to another. his Adm^{ty} -
18 Df 373-3. may be repeated in the former becoming capable.

Goodell - 19 Adm^{ty} may be repeated it is said without a sentence of revocation, as by granting a new administration. which is of itself a repeal of the former.

If the Ct that granted the administration, refuses to grant a repeal upon sufficient cause, an appeal may be taken.

The Consequences of repealing Adm^{ty} -

Ex Ray 684 It is a gen^l rule that when the only objection to an administration is that it is to a wrong person, the grant is not voidable and not void.

Therefore if the administration be regularly granted to a wrong person, and be afterwards repealed on a petition by the ordinary, the intestate will of the first Adm^r will stand. as if he gave the goods of the intestate to another. for this a rightful Adm^r may do.

In this case if the first Adm^r were a creditor of the intestate, he might retain, and any other rightful Adm^r not satisfy but debt. -
Salk 381
2 B & 418.
Ex Ray 684
1 Comyns 96. But if

But if an *Adm^o* when letters are repeated by Citation, makes a gift of the Testator's goods, by *Goodell 50*, *Covina* before the repeal the gift is void as a gift *6 Coke 18th* creditors. by Statth 13 of Elizabeth. the goods as a gift the *Second Adm^o*.

Yet in this last Case if the first *Adm^o* is repeated on an appeal to a higher ecclesiastical jurisdiction, the intermediate ^{and} of the first *Adm^o*, (ie as it appears between the appeal taken and the repeal) - are void.

A repeal on Citation is only a repeal *6 Coke 18th* of the former letters of administration, and does not affect the original sentence, but a Court *Goodell 50* sentenced on appeal, acts directly on the sentence, *per Eliz 400*, *3 Heble 206-7* appealed from, which is suspended by the appeal *38 Rep^r, 129* itself, and after a repeal is considered as if it *1 Comyns 204* never existed. *Ray 224* Note the cases in the *6 Coke 18th* and *1 Ray 224*, where the appeal was after an *afformance* on Citation.

And if the first *Adm^o* in the last Case has obtained judgment against the Debtor of the deceased before the repeal, the Debt may be relieved against it by an "*audita querela*" - *1 Comyns 204*, *1 Bred - 198*, *2 Sanders - 144*, *1 Mod^o 62*, *10 D^o 21*, *D^o - 389*.

So if the Debtor be taken on Ex^o on this judgment, he may be discharged on motion. *Brooks 91*, *2 Baw. 412*, *Ylivalon, 83*.

Adm^o granted by incompetent authority, as by a Bishop of a wrong diocese is void. *Salk 38th*

Agueat 13

3^d Hop^s 125. Agreeably to the last rule, that a ^{Refereed} citation does not avoid intermediate acts. It has been decided that if one die intestate, and a Will be forged and proved as his Will, and the Probate is afterwards revoked on citation, and Administration granted, all lawful acts (in such as a rightful Ex^r, may do) remain good.

Ancient and is not obliged to pay the same debts, so the right-
 shew is in full. But she held that after a re-
 v. 303
 2 Reg. 183, peace on citation all lawful acts remain good
 2 Bac 411, does not apply where the deceased left a valid Will
 1 Show 411
 1 Comyns 238, but to cases of actual intestacy only. If the
 D^c 264 deceased leave left an Ex^r and the ordinary not
 Plowden 277, knowing the facts grants Adm^{ty}, and the Ex^r after.
 D^c - 280, would prove the Will. He should avoid all mesne
 * Justices agree with the late decisions
 in that all mesne
 acts are good.
 acts done by the Adm^{ty} * There are some late de-
 - Cisions to the contrary.
 For the Ex^r has an interest of which the
 ordinary can't deprive him. The ordinary had
 no right to execute the Will for the Adm^{ty}

35th Feb 1861
 Sarsaparilla 47
 Do 177
 Lint 380,
 Salt 27
 Ed. Ray 1210.

Justice Bullen seems strongly to disapprove of the rule. If the celebration & Co have jurisdiction (says he), their sentence as long as it stands, unrepented shall abide in all other places and here they have unquestionable jurisdiction, the Governor as he proved to be being confessedly dead,

So it

So if the Decree left two Wills, of which the former was revoked by the latter and the Ex^{or} of the former, proves it. Yet on Probate of the second by the rightful Ex^{or}, all the moneys of the other Ex^{or} are void. "Bullock" and "Grave", deny the rule and cite "Levins". - But what of the two last cases of intestacy?

3d Rep. 190
Levins 158
Levins 90.
2d Rep 411-12
R. & C. 919
Com. Rep 132
13d Rep 198+

When the first Adm^r is repealed on Citation, the authority of the first Adm^r ceases with the repeal and he is liable for all acts, in his hands, to the rightful Adm^r, as well as for all unlawful acts.

2d Rep 412
2d Rep 137
Com. Rep 240⁶⁴

But his lawful acts pending the citation, are good. - Going on the Note 17.

The effect of an Administration being void, "at initiation" or of its being made by refusal or appeal, is that all acts of the first Adm^r are considered and may be treated, as the acts of a stranger; thus he may be sued as a trespasser.

Salk 387
Coke 18

Yet in the last case if the Adm^r has paid debts, legacies or funeral charges, which the rightful Ex^{or} should have paid, he shall be allowed to retain so much, as it shall go in mitigation of damages.

2d Rep 411
Shawen 279
Com. Rep 238
D. 204
2d Rep 150

"Justice Buller", (most particular of spirit, etc!!!) - contends agt this rule in case of a repeal of administration, on the Probate of a Will, tho, not in case of a repeal of any kind upon an appeal.

Com. Rep 204
14th Rep 349
Shawen 279
2d Rep 411
R. & C. 919
16th Rep 120
Hills, 338

3d Rep 130-1

But

But it has been held that if a debtor pay —
 1 Bar. 198, money as a just and Eq. to one who is Ex. de facto
 2 D. 411 having a probate under seal he shall never be
 Vol 3. 18:19 forced to pay it again (But "quod", is this the same law?
 1 Bar. 198 as just and Eq. — Where then is the necessity of law
 "audita querela"?

If after Edw. granted a new one he obtain
 Dyer 337, a copy of the first, and without a repeal of the first, and the
 5 Coke, 19 Second Edw. releases, and this Edw. is then repeated,
 1 Comyns 264 the release is void except as agt. Creditors.

What acts an Ex. may do before Probate.

What 33 In the Ex. claims all his interests from the Will
 1 Rolle 97 the property of the Testator vests in him before
 1 Atk. 400, Probate on the death of the Testator: Proving
 2 D. 172-3 the Will is called a nuncupatory Ceremony. it is prop.
 2 D. 292 only a nuncupatory evidence of the Ex. right.
 Godolph. 144

Hence a plea that the person who sues
 Holport 31. as Ex. has not proved the Will, is bad. It should
 2 D. 396, be that he is not Ex., and then it would be
 Talk 3 D. nuncupatory for the Plf. to produce the Probate —

This evidence of the Plf. right to Probate
 2 D. 412 is nuncupatory, it is said because, as the Probate should
 Talk 3 D. be an inventory, exhibited, and other acts to be done
 1 Gutton 30, which are for the benefit of the Creditors & Legatees
 G. Thompson,

Therefore the Ex^r derives his right from the Will. he may before probate do many acts which will be valid.

1 Comyns 238
2 Bac 412-13.
West 33
Godolph 144

But an Adm^r can do no valid act till letters of Administration are granted; for he derives his whole authority from the appointment of the ordinary. By valid acts are meant acts affecting the capital or the rights of Claimants and their indifferent acts are those which any person may do. The Ex^r may e.g. take possession of the Testator's goods before probate and may enter the House if he can do it without breaking, and take of ornaments belonging to the Testator.

2 Bac 412
Loverich 173
Godolph 144
Pleasden 277
West 33
Pleasden 277
Loverich 173

But he may not break an inner door or open Chest for that purpose. So before probate he may assent to a legacy, and the assent is binding and vests the interest in the Legatee.

2 Bac 413
West 312-47
1 Comyns 238
Co Litt. 292
Godolph 144
Pleasden 277

So he may pay debts and Legacies, receive debts, and give and take releases.

Loverich 174-5
Hutton 31
5 Coke 28
Sewins 174
1 Comyns 238

But if one entitled to Administration should receive debts and give releases before Administration granted he might after obtaining it recover them again; for the right of action was not in him at the time of the first payment.

1 Comyns 238
Moss 119
Do 120
Swink 281
5 Coke 28

So the Ex^r before probate may sell give away or otherwise dispose of the goods of the deceased.

1 Comyns 238
2 Bac 413
Loverich 174
But

Went. 34.5.49. But it is otherwise with the Administrator. —

2 Bui. 413. So if a bond of the Testator be conditioned for
Went. 34 payment at a certain day which happens after
Sover. 174 the Testator's death, but before probate, it must
be paid by the day to the Ex^r — or by O.E. the
penalty is forfeited.

So on the other hand if the bond were given
Sover. 173-4 by the Testator, the Ex^r must pay by the day
the before probate, or the penalty is forfeited. —

But now by the Stat. 4th of Anne. penal-
ties are charged down, in Ct. of Low. and pay-
ment in Ct. of principle interest and Costs. —

Joseph. 145. A person named Ex^r is said to be a Com-
1 Mod. 213 plete Ex^r, to all purposes, except that of bring-
2 Mod. 146 ing actions. — But he cannot bring actions if it is
Sover. 177-8 paid before probate.
Salk. 301
5 Coke 28
10 D. 32
Co. Litt. 292

Went. 34.5.49. But even this restriction is to be taken
9 Coke 39 with two important qualifications; indeed it
2 Bui. 413 seems to be inaccurately expressed. For 1st it does
not apply at all except to two Cases, to actions
of Debt and other actions, on the Testator's Contracts,
and such actions for Torts, as accrued in the life-
time of the Testator. Therefore before probate he
may maintain Trover & trespass. Reprieve &c for
injuries done to the estate after the Testator's death.
Since in these Cases he may sue upon his
own possession, —

y60.

He may indeed maintain the action with-
out describing himself as Ex^r.

Doveles 174
2 B & C 413
Guthrie 154
2 B & C 441
11 Mod 52-3.

He may "profess" of letters testamentary, is
not necessary. So before probate he may disclaim,
or assign, for realty, when the reversion of a term of
years comes to him, from the Testator, and the rent-
accrues after the Testator's death, because the rent-
accrues after the reversion is vested in him: But
he could not if the rent accrued during the Tes-
tator's life.

Salk 300
Doveles 174
1 Kent 300
1 Rolle 417
2 B & C 413
1 Comyns 338.

So before probate he may main-
tain Debt to, or in all of the interests good, by
himself, for here the Contract is his, and not the
Testator's.

Comyns 338
Doveles 174
West 41.52

With respect to actions of Debt, and other
actions on the Testator's Contract, it is not true as
said above, that an Ex^r cannot even in these Cases
bring an action before Probate.

5 Coke 29
7 Coke 39.

It is clearly agreed that in these Cases he
may commence an action before Probate, but
he cannot maintain the action, or declare before
Probate. The Will may be "tested" before Probate.
It is sufficient if he produced his letters testamentary
at the time of suing, when he must make
"profess". There remove the impediment a "professio".

2 B & C 413
1 Comyns 338
1 Rolle 97
Sham 23
3 Givins 58
1 Kay 370
1 Kay 481
1 Kay 371
Salk 302
Q 303.307.

Of Co-Executors.

If there are several Ex^{rs}, they are considered
in Law

2 B & C 395-
1 Comyns 240
Godolph 134

1207
 2d ed. 23^d in Law, as it respects the Testator, as one person
 Geo. Eliz. 347
 Convey 89, Third interest is joint and indivisible
 West. 95. therefore it is a general rule that the act of one is
 Geo. 134 the act of all. Hence the possession of one is the
 whole 920 possession of all. A sale or gift by one of the
 Dyer 23^d estate is valid, it being regarded as the Contract
 Geo. Eliz. 344 of all. So release by one of all other debts he is bind-

2d ed. 395 So if one grant "all his interest" in the Tes-
 Dyer 23^d tator's town, to a stranger, the whole passes for
 Geo. 134 each, has an entire and indivisible interest
 Sovey 21
 Geo. 134 So if one release his part of the Debt due to the Testator,

The case of Co. is different from that of
 joint Tenants. For each of the Co. is possessed of
 2d ed. 395 the whole, there being no parts or moieties in the
 Geo. 134 possession. So if one grants his interest in the
 Testator's estate to his Co. nothing passes by
 the grant for each was possessed of the whole before

Geo. 135 So one Co. can't have an action of account
 1 Com. 89, 240 agt. the other for the profits of the Estate
 1 Role 117-187

Geo. 135 But Co. have a right to plead different
 1 Com. 240 pleas. Therefore a warrant of attorney to confess
 1 Role 929 judgment for all is ill, and the judgment will be set
 2d ed. 397 aside on motion. But one of two Att. cannot

1 Com. 240 make a valid release nor convey any interest
 1 Role 400, So as to bind the other, Both must join for this
 Sovey 21 an-

authority is joint and entire. - - Note 18. - Joseph 184

This was formerly doubted. - There is an ex-
ception to the rule when the Town may sue
in his own rights as in "Gressopp" building a ^{new} ~~new~~ ^{with} 400,
his own property. Hence they are considered as
principals, and not as representatives, and hence
one may release the right of action

1st Rule
1st Corrupt 203

If one of two Es^{rs} is the power of another
to the other: The same is the rule respecting
A^{rs}

It is said that an Es.^r may compel his
Co-Ex.^r to account to him in Chy. for a moiety
of the appts. - "Inure."

So if the Ex^{or} be made just w^y Legatus. MS. B. 1. 390.
one may see the other in the Spiritual C^{ty} Joseph 130.
for a monarchy. For he is in the Character of West. 199.
a Legatus. - MS. B. 1. 395.

It is a Gen. Rule that one P^r is not chargeable for the wrong of his Companions, and is not further liable than for a plea that come to his hands. 2 Bar^w 395. Godolph. 134. West¹⁸ 100. Godol¹⁸ 318. Note 19

Yet if all the Est^{es} join in giving a receipt for money actually received by one only all are liable at Law to Creditors, as if all received, & each is liable for the whole. *Wright, Exp. -*

This rule is however different in Equity. There the actual receiver only is liable; for

^{1st} Rule
 1 Conyus 253.
 2nd Rule 410.
 Equally - 21.
 Salt - 30.
^{2nd} Rule
 2nd Rule - 574
 1 Conyus 240.
 1st Rule - 9.
 2nd Rule 390.
 Lard. 33.

recovery is the substance; joining in the receipt
is matter of form only.

Salk³⁰⁷ To all the Ex^{rs} make but one person
9 Coke 37 in Law. they are regularly, all to be sued, and
2 Bac 390 all to sue.
West. 98

2 Bac 390 If an action be brought agt. an Ex^r a
piece that answered is Ex^r, without averring that the
Devis¹⁶¹ letter has administered, is ill, for if he have not
1 Giff²⁴² administered the Pl^{ff} is not bound to know that
he is Ex^r.

2 Bac 390 But if one Ex^r sue alone it is suffi-
cient for the Def^t that there is another, without
D^r 381 note averring that he has administered, because the
fact is not supposed to be within his cognizance

2 Bac 390 If an action be brought agt. one of several
Cothran 51, Ex^{rs} and he does not plead the mistake in
abatement, he loses the advantage of it. —

Salk 307 If in case of two Ex^{rs}, one refuse to accept
9 Coke 37 or present, yet he must be named, and
Goodph 134 there, Summons, and Sworn

Goodph 139 The object of Summons and Swornance is
Co Eliz 52 to prevent the Ex^r who does not act from re-
Houston 128 leaving.
2 Bac 390
West. 98

D^r - 104 The effect of the Summons is to take
Goodph 134 away his privacy, to the suit, to make him
2 Bac 390 a party to it. But if the Testator be commit-
ted on the goods of the Testator while in possession
of

of one of several Ex^{rs}, he alone may sue for it, West 104
For here he need not sue as Ex^r, but on his own
possession, A contrary rule is stated in some 2 Leon 289
of the Books on the ground that the possession of 3 Bar 397
one is the possession of both, or all 1 Atk 402

Of an Ex^r - "de son tort"

An Ex^r, "de son tort," is a person who without
any authority from the Testator, or ordinary law
such act as belong to the office of an Ex^r, or Adm^r,
to be an Ex^r, or Adm^r, he must at least be a "trespasser."
The Ex^r, any unlawful meddling with the
assets of the decedent, will make him an Ex^r,
"de son tort." - Thus (e.g.) taking possession of the
assets, and converting them to his own use; pay-
ing Debts out of the assets; receiving and sending
for Debts, due to the decedent, and in Gen^l all
acts of acquiring, transferring, and disposing the
assets will make a person an authorized Ex^r and
Ex^r, "de son tort." -

The value of the assets taken is not 2 Bar 390
material, since even the milking of Cows, Dyer 100,
is sufficient. "Quere" is it thus necessary to their
preservation? 2 Bar 100,

So paying Legacies out of assets, 2 Bar 387
making a specific legacy without the Ex^r's consent, 1 Role 418,
or by pleading when paid, as Ex^r, - any other, -
pleading that he was not Ex^r, - for any other -
plead

2 Bar 387
West 171
Gossett 90
Hemph 281
5 Coke 33 ante
West 74
Lovelock 51
2 Atk 99
2 Bar 387
1 Role 417
Dyer 100
D^r 157
Robert 49
5 Coke 33 ante
D^r 34

Comps 2045, p^{er} he admits himself to be Ex. —

23rd 387, So the Will of the deceased becomes Exec-
Comps 2055, utrix "de son tort," by taking more appared than
Dyer 100, is convenient for her degree. —
Rolle 918.

It a stranger takes possession of the effects
15th Sep. 97, and delivers them to another, the carrier is Ex.
"de son tort" —

23rd 387-87, B. Stat 43rd of an intestate
Comps 2055, given by fraud to a third person, or a release
Geo Eliz. 406, of a Debt by fraud, the donee or releasee
D. — 410, is Ex. "de son tort."

23rd 387-87, So a fraudulent gift by the deceased
Rolle 449, himself will make the donee Ex. "de son tort"
yet overland 157, as to Carriers from the receipt of the Car. but
Geo Jas. 271, not as to the rest of him. So again he for it is
23rd Sep. 97, good agt. them
D. — 597.

But one may do many things
23rd 387, taking to the effects of the deceased without
making himself an Ex. "de son tort." Thus,
Comps 2055, feeding and taking care of the Cattle of the
Godolph. 94, deceased, paying his Debts with ones own —
Sover. 51, money, repairing the building when suffering
23rd 387, for want of it, providing for his Children he
23rd 387, 99, will not make a person Ex. "de son tort"

Comps 204, So taking the effects under the Claims
Dyer 100, of a party, unless the claim be merely
Colman 10

Colours &c. a more artifice, for how he
does not undertake to act as Ex.^r —

What acts are sufficient to constitute
an Ex.^r "do son tort" is a question of Law. —
The rule, at least the principle of determina-
tion is this: if the act of the stranger is such
as fairly warrants the inference that he claims
the management and disposal of the assets, he
is Ex.^r "do son tort" & it follows, not, in the
first case the act is such an one as belongs
to Executors, &c. —

Dyer 166th
11 Mod. 126
Q. — 1667
2 Bacon 388

The above rules as to what acts —
make an Ex.^r "do son tort" apply, in third rule
extent only to Cases where there is no rightful Ex.^r
or Administrator, and those where there was none at the
time of intermeddling, —

Salk^r 313-14
2 Bac^r 388
5 Chanc^r 33
Q. — 34th
Swink, 289
Q. — 380

Good after Probate of the Will or after
the Ex.^r has otherwise administered, or after ad-
ministration granted, Common acts of inter-
meddling as taking Possession and Converting
and misapplying, will not make an Ex.^r "do
son tort" for there is a rightful Ex.^r and the
goods taken after the Probate, are assets
in the rightful Ex.^r, they having come to his
hands, — Yet the wrongdoer is liable to the
Ex.^r as a Trespasser

Salk^r 302
Q. — 307
2 Bac^r 414
Q. — 441

Note 20th

But if even after Probate
one not only intermeddles but claims to be Ex.^r
he

2 Bac^r 388

5 Coke 34. he is chargeable as Ex^r. "do son tort". And so
 11th NB 44. seems from "Falkland 313" that this claim may
 Salk^o 313 be inferred from certain acts, so as to subject
 D^r - 319 such as receiving and paying Debts, the act from
 common acts of intermeddling, is or such as are
 in the nature of common Responde

Salk^o 297. If the intermeddling be before the estate is
 D^r 313. as in cases of intestacy before Admin^{tr} granted,
 3d Bar 388. the stronger intermeddling is Ex^r "do son tort" -
 5 Coke 34. that the fact is nothing more than making pos-
 11th NB 44. session, and he is liable as such to Creditors unless
 17th NB 918 he delivers over the goods to the rightful Ex^r before
 6th Edg. 565 action brought -
 2d Edg. 99

The ground on which an Ex^r. "do son tort" is liable to Creditors is that from his acts
 12 Mod^o 141. they have cause to presume that he is a legal
 2d Edg. representative, and he has no right to disprove
 the presumption, when his own wrongful acts
 have raised it -

6th Edg. 339. An Executor Ex^r. "do son tort" is liable to
 11th NB 137 all the trouble of Ex^r, without having any of
 11th NB 1165 the profits and advantages of it. Thus he is li-
 11th NB 200. able to be sued as Ex^r. but he can't sue as such
 2d Bar 3787. He can't retain for a Debt due to himself, as
 D^r 345. other Ex^r may, not even for one of a period
 3 Coke 30. regred.
 11th NB 527. But if he pay Debts with his own money
 11th NB 541. he may retain to the amount paid -
 11th NB 471. So if -
 2d Edg.
 11th NB 235
 11th NB 75

So if after intermeddling he receives letters of
 Adm^{ty} - he may retain for his own Debt. agtst the
 Adm^{ty} of an equal or inferior degree. For the let-
 ters of Adm^{ty} purge the wrong except that he is
 still liable to be sued by the name of Ex^r. "do
 son tort" - he having however after Adm^{ty} granted
 all the "privileges" of a rightful Adm^{ty} -

1 Comyns 200,
 Fitzg. 1160
 Co. Litt. 104
 Vent. 18
 Stat. 337.
 12 Geo 923

It would apparently Contrary to the last is
 that an Ex^r. "do son tort" after having taken -
 letters of Adm^{ty}, may be charged as Ex^r. for that he
 shall not discharge himself by anything, "ex
 post facto" But this rule means nothing more
 it seems, than that after Adm^{ty} obtained, he may
 be described in a suit agtst him as Ex^r. and he
 cannot on this account abate the Writ, for as to
 other "purposes" the wrong, is purged. -

2 B. & C. 391
 2 Secured 98
 6 Geo 102
 305, 565
 810

And Ex^r. "do son tort" is liable ^{only} as far as
 he has a power to the rightful Ex^r or Adm^{ty},
 as all Creditors of the deceased, and to Legatees. -

2 B. & C. 391
 2 Secured 98
 6 Geo 102
 305, 565
 810

And Ex^r. "do son tort" when sued by the
 rightful Ex^r or Adm^{ty}. is described not as Ex^r,
 but as a stranger, and common trespasser. -

2 B. & C. 391
 2 Secured 98
 6 Geo 102
 305, 565
 810

But if the Ex^r. or Adm^{ty}. be a Creditor to
 the deceased, he may bring Debt agtst the Ex^r.
 "do son tort" with the avowment that none of the
 assets came to his hands.

2 B. & C. 379
 12 Geo 940
 Stat. 387.

Id. -

5 Coke 31⁽¹⁰⁾ The action by Creditors, an Ex^r. "de bonis tortis" is
1 Mod^o 208. named Ex^r. generally.

Mod^o 527. It is a Gen^l rule that an Ex^r. "de bonis tortis"
5 Coke 30⁽¹⁰⁾ is liable only to the extent of assets received, and
West^o 18 as agt^t Creditors he is allowed all payments made
Carth^o 104 to other Creditors, of an equal or inferior (superior)
2 Bae 507 degree.

Mod^o 441-71 He may plead "plene administravit"
West^o 171 and give such payment in evidence to support
Shannon 74 the issue. But as agt^t the rightful Ex^r. or Adm^r,
5 Coke 30⁽¹⁰⁾ he can't by pleading such payments bar the ac-
Carth^o 104 tion, and such plea therefore is ill.
2 Bae 390-1

Agt^t is the Gen^l, & he may "rescind" - that
1 Kent^o 345; is he allowed the amount of such payments,
Q^u - 350, in mitigation of damages unless he has the right
2 Bae 507 to sue Ex^r. or Adm^r. is by such payment prevented
from retaining his own debt.

There is a full set of law even given & the prop-
erty thus disposed, of agt^t the rightful Ex^r. or Adm^r -

The an Ex^r. "de bonis tortis" is Gen^l Chargeable
1 Comyns 200, only to the amount of assets, yet if he pleads
West^o 207 "he unswers Ex^r" - to an action by a Creditor he is
2 Bae 390, liable for the whole demand, whether he have
8 Ky 89 assets or not to that amount. "prop Resc^o D^o & C^o"
Carth^o 472 must be found in policy. To prohibit such a plea, so
Hogart 49, that
Wolfe 99.

2 Bae 396, It is said however in this Case, where
1 Wad 147-8, the value of the assets received is very trifling,
Note 22 the Ex^r. "de bonis tortis" may be relieved in Equity.
If in -

If in this case he plead "Plene Administravit" 1 Comyns 246.
he shall not be charged beyond assets received. - Dyer 100 -

If there be a rightful Ex^r and one or
son lost - they may be sued jointly or severally. 1 Comyns 200,
But it is otherwise in case of a rightful Adm^r, West. 355.
for an Adm^r and Ex^r can't be joined in an action.

At C L the Ex^r and Adm^r of an Ex^r "do son
lost" - were not liable to Creditors, tho, they were 1 Comyns 200,
in Equity. - But now by Stat 29 or 30th of Chas, 2d 393
2d - they are liable at Law to Creditors. 2 Bac 391
Longash 51
Burns 191
But whether that is legal and why should it be so? -
Of making Debtors Ex^r -

By the old English Law if a debtor were made
Ex^r his debt was discharged. - The reason assigned - 1 Roll Rep 179
was that he could not sue himself But it is settled 439
has since been holden that his Debt is a debt in
his hands for the payment of the Debt. and - 2 Bac
Legacies of the deceased. -

So if there be other assets sufficient 5 Coke 30
for the payment of the Debt and Legacies he D^r - 130,
may still retain his Debt: the reason of which Robert 10,
is that the Debt in this instance, is considered 606 373
as a residuum - and it is the opinion of " 1200
Judge Record" that he is discharged only when
he takes the residuum. There has been some
view no decision recognizing this principle,
But a clear proof that it is a true one is
that the Debt of an Adm^r who is never admitted
to.

to the residuum, is not & is charged by his ap-
 pointment, * In England the Ex^r, as such is
 not a Legatee, unless there is something in the
 Will clearly manifesting the Testator's intention
 that he should not be. —

Rehe 920
 Yelverton 100.
 Crooke 373.
 2 Ba 379.

And if this Claim or right to withhold a
 payment of his debt, ag^t those who claim
 under the Stat of Contributions, is found to be
 the case that he is entitled to the residuum
 it may be a question whether if he have
 such a Legacy, as would give him right to the
 residuum, he can retain his Debt, ag^t such
 Claimants? — General.

Of making Creditors Ex^{ors}.

A Debtor may make his Creditor his Ex^r —
 and in such Case the Creditor ^{may} retain as
 much of the Testator's assets as will satisfy
 himself. But this must be understood where
 the Debt is in equal degree with such Creditor
 for if he be a Simple Contract Creditor, he can-
 not retain ag^t a Creditor by Specialty, or any other
 of a Superior nature.

10 Mod 490.
 185.
 128.
 31.
 115.
 378.
 304.
 2 Ba.

So if Administration be granted to a
 Creditor, he may retain as much of the assets
 as will satisfy himself, but this also must
 be understood, of Creditors in equal degree.

Goodale 118.
 West 31.

* Note

"May not the reason of the Debt not being discharged
 be that he is not appointed by the will as the Ex^r is? If so,
 this is false reasoning." —

Thurs.

These rules from the nature of the Case are
reasonable and just. For as a Creditor who first
commences an action gains a priority to all
others in an equal degree, and as an Ex^r must
sue himself, he must needs allow it to remain
for his own sake, he is postponed to all others in an
equal degree. But as Ex^r is said to be "He is
a Creditor himself, because this would be
allowing him to take advantage of his own wrong."

5 C. 30,
2 Bac⁴ 379,
2 R. 507.

An Ex^r is not obliged to satisfy in part
when there are not assets enough to pay the
whole Debts.

In England if an Ex^r has to do with
parties, it has been a question to whom the
Surplus of personal property belongs after
the payment of Debts. Legacies &c.

2 R. 420,
West⁴ 4
Tulk⁴ 440,

Formerly the Ex^r himself was always con-
sidered residuary Legatee. But now if any con-
siderable surplus not appropriated to any par-
ticular purpose be left to the Ex^r. If there
can be collected from the Will an intention
in the Testator that the Ex^r should not take
as residuary Legatee, the Ct. of Chy will order
a distribution as in case of Administration.
Still however if no such intention can be
inferred from the Will, the Ex^r will be con-
sidered residuary Legatee. —

3 R. 413
2 R. 81,
Warr 473.
2 Atk 47,
3 D. 220,
D. - 300,
Roper 220-1

In. —

In England an Ex^r has no waste -

Proper 239.
2 Vesp 235.
D. 275

If Legay was the Ex^r right is the residuum in those cases only where it affords proof of an intention, in the Testator that the Ex^r should not take the residuum

Parol proof is admissible to show that notwithstanding the Legay the Testator intended the Ex^r should be pendman Legay. - But this rule does not hold "vice versa" i.e. parol proof will not be admitted where there is no Legay. to show that the Testator did not intend that the Ex^r should have the residuum. -

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 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2180. 2181. 2182. 2183. 2184. 2185.

Testator, to take place after the death of the S. B. 497.

To every Will there must be an Ex^{co} - Sovereign 2
a testamentary instrument appointing an 798 Rep 146
Ex^{co} is called a Testament. 286.

Genly. any person labouring under
no particular disability may & prove of his Sovereign 140,
person properly by Will.

And Genly. in all cases the presumption 2 Mod 318,
is that he was of sufficient discretion and ability Co Litt 89
to make a Will. So that the burden of proof lies Black 314
on those who would contest the Will.

But persons of the following descriptions
cannot make a Will. - 1st Idiots. 2^d Persons
of non sane memory, as Lunatics. 3^d An aged
person if it appear from his conversation
at the time of making the Will that he was
not of sufficient discretion. * * Note 23.
4th If the
Testator was unable then ignorant or blind -
unless a other could read the Will it must
have been read to him and such reading must
be proved. 5th Genly. deaf and dumb persons
cannot make a Will. but proof may be ad-
mitted to show that such person knew the
contents, and had understanding & sufficient
to make a judicious disposition. 6th A
drunken man cannot make a Will. 7th An
alien.

* *Note 24* *Land or Goods.* * 8th The age of discretion for making Wills is according to some authorities 14 in males, and 12 in females. Others fix the age at 15. But Judge Reeves supposes it to be 17. Common according to Lord Hardwicke the Civil Law governs in this respect - by which this was the age, fixed at the age of 17 in Canon by Statute. A Husband can dispose of the Wife's Chancery in action. Chancery real or personal, by Will &c. he may dispose of all by Deed except the first kind of personal property. Now can a person by Will dispose of property held in joint tenancy because the "jus accensuendi" interposes between the right of the right of the testator and that of the Devisee or Legatee.

20 Geo. 2^d 1727
12th - 133.
60 Geo. 2^d 20.
21 Geo. 2^d 173
60 Geo. 2^d 173
40 Geo. 2^d 334

* *Note 25* *
20 Geo. 2^d 1727
12th - 379

A remainder of a Chancery interest may by way of an executory Devise be limited, even after an estate for Life, or even estates for lives, provided that the remaindermen be all "in age" at the death of the Devisee, and that the contingency on which the remainder is to vest within a Life or lives and 21 years and the fraction of a year. * The life man must lodge an inventory of the property limited over in the Ct of Chy, and if in failing circumstances give security that it shall be forthcoming. - An

An estate Tail Cant be created in personal property. So if personal property be given to a man and the heirs of his body, the absolute ownership vests in the first taker, there arose a question for this ruled by the English Lawyers is that an estate Tail in Personal Property Cant be created by feoff and recovery, and therefore if suffered to exist it must be a perpetuity, which the Law abhors * *Note 20th*

A Will of personal property ought regularly to be in writing, signed and published by the Testator. It is not necessary that there should be subscribing Witnesses, as in a Devises of Real Property, and the Testators name written by him self in any part of the Will, is a sufficient signing. That is indeed in "Lovelass", an in sealed given, where the Testators name tho, written by another person, yet being approved by the Testator, was holden to be a sufficient signing.

If the Testator cannot write his name with his name written by another, is a sufficient signing. It is said too, that the Will if it be in the handwriting of the Testator without signing is good, and even if it is in the hand writing of another, in some cases —

27th. 501
referring to
Goodrich's case
21
Chancery
200
Comyns 454

It is said also as a General rule that if a Will of both real and personal property be well executed, as to personal property only, it is valid only

only as to the real property. In support of this
 rule it is said that the intention of the Testa-
 tor ought not to be unnecessarily defeated,
 and as the Will is good in part the intention
 as to this part ought not to be disregarded.

But this reasoning is not satisfactory; for
 it is not improbable, that one part of the Will
 was made with an eye to the other and that
 the intention of the Testator would be violated
 by permitting the Legatee to take all the good
 General Property, and then come in for a share

* Note 27th of the Exec. *

As to the manipulative Will
 might be made of personal property. - But
 the restrictions imposed on such Will, by the
 Stat. 29th - Chap. 2nd, have almost abolished them.

Their Duty. The first duty of an Ex^r, as
 soon as it is taken out an inventory of all the
 Estate which came in his hands, and
 procure an appraisal of it by judicious pro-
 fessors, under oath. And thus the Ex^r must
 must account with the Ct of Probate for
 the property inventoried. But is not bound
 at all events to pay the amount of the ap-
 praisal. If the Estate be sold for less than
 the appraised value the Ex^r, he is not liable
 for the loss unless it was incurred by his own
 fraud or negligence. - But if the loss do
 happen

happens this his fault he is liable on his bond
to an action by Creditors. But if Creditors
sue in Common Form for this debt, they
must ground the action much on the in-
ventory. If the Executor should be sold for
more than the apparent (or appraised) value
the Ex^r is gains nothing, but must account
with the Ct. of probate for the avails of the
sale. A Judge of probate ought not to be
just an inventory of property, the title to which
is disputed. For the decision cannot affect the
right of trying the title at C. L.

The Ex^r is never liable to Ex^r until Shephard 472.
after he has received by him unless he have
made unreasonable delay. Jones 22
(17) - 467

If an Ex^r submit to arbitration, and
the arbitrators award ag^t him the payment
of a certain sum he cannot afterwards aver
the report of a jury as to that claim. -
H. Rep 433
5th - 81
2nd - 571
see page 434

As fast as a jury come to his hands
his liability increases. An "indivisible Comp^y"
to pay - before Ex^r is as such. of money and
then the Executor does not make the Ex^r
personally liable. The power and duty of an Ex^r
and Adm^r are very nearly the same. There are
even some points in which they differ. They are
bound for their Executors, or intestates debts, to the extent of their
assets only. -
The

11th 102
D. - 108
2nd - 518
Ex^r 318
2nd 115
106

The Payment of Debts.

The Ex^r. or Adm^r. is bound to observe a certain order in the payment of Debts which is as follows:
 1st General Charges and the expenses of providing the will. - 2nd Debts due to the King by record or Specialty - 3rd Debts by Particular Stat^s, as for forfeitures &c. &c. * 4th Debts of record, 5th Specialty Debts, and 6th Debts by Simple Contract. - This part of the English Law does not present a very agreeable picture to the mind. - For Simple Contract Creditors whose claims are often the most-moribundous being postponed to all others, may be repaid of their whole Debt -

Of Debts in equal degree the Ex^r may pay which he pleases. But he cannot give for a "debitum in presenti. Solvendum in futuro" - to those which are already payable unless the latter are of an inferior degree. -

If an Ex^r. have paid a Creditor of a lower degree while there are others of a higher degree unpaid, and has no assets he is personally liable. Yet in this case he is excused if he did not know of the latter. -

A Creditor may gain a priority to those in equal degree by what is called a *Legatum*. * *Not* 229 *generally*, &c. by commencing a suit. A voluntary

A voluntary bond is postponed to all Debts 1st M^o 292
but preferred to Legacies. — — — — — Sould^{er} 58.

If a Creditor object to the payment of
a bond given by the Decedent on the ground that
it was voluntary, the Ex^r may by Bill bring
the party into Ch^y. to litigate the Claim at page 379.
then own expense, and he may make pay-
ment according to the decision then given. — * Note 30th

Inquiry may always be made into the
considerations of Bonds when those persons are
interested. It is the duty of the Ex^r to retain
a bill for the payment of Debts. "in present
Solvendum in futuro," —

If the Ex^r having thus retained a bill,
become a Bankrupt before payment it is
somewhat doubtful whether the Creditor can
pursue the bill into the hands of the Assignee,
and Receiver. It seems reasonable however
on principles that the Creditor should pursue
the bill as in other cases. —

No time is limited by the English Law
for the exhibition of Claims, ag^t the Estate
of a person deceased. — If the Ex^r has paid
out the whole of the Estate observing the
priority of Claims above mentioned, and issued
he may plead "Solene Administravit." — + Note 31th

Op

Of Legacies.

BB2. 2400; After the payment of ²² Decr. the next duty
 2000/27 of an ²² Decr. is to pay the Sagacien —

284. 4th A Bequest is defined a bequest of particular goods and chattels by Testament

The person to whom a Segay is given
Nov^o 434. is called a Segated. An Ex. to whom a
286, 41^o Segay, is given may not prefer himself as
in Case of Ex. Dep. U.

At the death of the Testator the incho
Co. Edw. 111 all rights of the Legatee Commenced, tho, the
2. Atk. 598, legal & property of the Legatee subsisted in
Apr. 190 The Ex^r. And he may dispose even of
the Co. and be obliged to pay the
Legatee's debt. The assignee of the Ex^r vests the legal & property,
the value of it, in the Legatee, and any slight matter may
be taken care of. amount to an assent.

Pecuniary and Specific Legacies.

3 Att^s, 90,
Moore 413, Specific Legacies are bequests of things, Spec-
2 Silk 416, fide. pecuniary are bequests of Summs of
Roper 257 money, made in test, & not which out-dies
1 Nov^o, 31 tify any particular person.
20^o, 688.
Roper 422

Procurary Legation are liable to Credit
before 25, as before Specific, but then are also liable
to 25, if the other assets are insufficient. —

But if a part only of the specified *Species* *acris*,

Legacies are taken for the payment of Debts,
the Legacies whose parts are not taken are Com Roper 113
permitted in Chy. to make a reasonable allowance Com Digest
and to that those Legacies have been taken — ^{the Legacy}
^{in Chy.}

This rule obtains however only when it is
necessary to take a part of the Specific Lega-
cies. For if the Ex^r take any Legacy of this
kind he shall be answerable to the amount of it.

If a Specific Legacy be lost or destroyed ^{Chy 100,}
by any unavoidable accident the Legatee to Roper 24
shows its given must bear the loss.

If the payment of Specific Legacies ^{Roper 111}
if there be not assets sufficient to pay the po ^{Roper 422}
Quintary Legacies, there must be an abridge ^{Chy 50. 495.}

But if there be not sufficient to pay
the Specific Legacies, those who are paid first
are always preferred, and there shall be no abridge
between them.

There are Cases where pecuniary
Legacies are preferred to Specific, but this pre ^{Duch 393-4}
ference depends wholly on the Will or intention of Roper 113,
the Testator. Thus if all the personal Estate
in a place or places be bequeathed in Specific
Legacies, when there is no personal Estate elsewhere
and afterwards a pecuniary Legacy is given to
be paid out of the personal Estate, the Spe-
cific.

Specific Legacies are charged with the pecuniary Legacies, there being no other personal property from which it can be raised -

Vested and Lapsed Legacies.

289 Op. 16295 A vested Legacy is one which of course vests in the Legatee or his representatives.
 209 Op. 200 A Lapsed Legacy is one which cannot be taken by the Legatee. But sinks back into the residuum.
 209 Op. 200 If the Legatee dies before the testator the Legacy is lapsed. The Legatee who has the residuum it then he one is entitled to lapsed Legacies. But if there be none lapsed Legacies will go according to the Act of Distributions.

To this rule there are one or two exceptions - It has been decided that if the Legatee lapses by the death of the Legatee during the lifetime of the testator it goes to the next of kin, and not to the residuary Legatee.

289 Op. 16295 A Legacy given to A payable at a future day is a vested Legacy. But a Legacy given to a man when of a certain age does not vest till he arrives at that age. And if he dies before the time specified it is a lapsed Legacy.
 209 Op. 200 This distinction seems to be more nice, and probably, tends to defeat the intention of the testator. The rules of distinction are not however without

without exceptions. If such Legacies are charged on Real Property, and the Legatee die before the time at which they are payable in one case and given in the other they shall lapse. This exception is taken in favour of the heir, who is always a favourite in the English Law.

Another exception is that when the Legacy given at a future time is put upon interest it is not lapsed tho the Legatee die before that time,

So also when the Legacy is to be paid out of a certain fund, which yields an annual increase it is vested. Chy. will compel an Heir to pay a Legacy charged on his Land, yet if such Legacy lapses or if it be vested, and the Legatee, who before the day of payment the Heir will hold it to the exclusion of those who claim under the Stat. of Distributions,

The same favour is shown to Devisees, on whose Devise Legacies are charged.

The Person who is entitled to a lapsed Legacy may demand Payment immediately after the death of the testator, provided that he pay a year and a day before, and no time is fixed by the Testator.

A Legacy may be made with a proviso that if the Legatee die before the Testator or before the

P. Wm 610,
L. B. 513,
3 Mth. 545,
2 Mth. 263,
3 Mth. 180,
3 Mth. 573,
1 Mth. 452,
2 Mth. Chy. 305,
D. 375,
P. Chy. 317,
Mth. 412,
P. Wm 276,
Mth. 522,
D. 552,
Wm 31,
D. 383,
D. 293,
P. Wm 285 +,
P. Chy. 470,
P. Wm 207,
the

28th 521 the Legatee attains a certain age it shall go to
 Q. 1. 511. another and such limitation will be good

Conditional Legacies.

It is a man's order a Legacy to be given on a
 Roper 42 Condition not to dispute the Will, and the
 28th 91. Legatee Commence a Suit where he disputes
 the validity of the Will yet this is no forfeiture
 of the Legacy if there were *probabilis Causa litigandi*

It is a Gen. rule that all Conditions
 in restraint of Marriage are to be construed
 18th 80. strictly, being prejudicial to Society, as they
 18th 20. hinder the Propagation of the Species
 18th 249. Legacies to a fact are annexed Gen. Conditions in
 20. 252. restraint of marriage vest absolutely, and the Con-
 ditions are void, as when the Condition is that
 3d 214. the Legatee shall not marry a person of a
 3d 379. particular profession or calling.

But a Legacy left by a Husband and having
 18th 20. a family of Children to his Wife on Condition of
 18th 80. her not marrying is exempt from the above
 Joseph 45. rule. For the Husband is supposed to have in
 20. 215. view, and to be interested in the nurture and
 education of his Children, on this account the
 Condition is allowed to be binding.

Yet if there had been no Children, or the
 Joseph 45. Legacy had been so given by a Stranger, the
 Legacy would vest and the Condition would be
 null and void.

negatory, there being as it is said no good reason why Wills should not mean as well as made.

So Conditions restrictive of marriage before a reasonable age, or not to marry at a particular place have been adjudged good; as also a restriction not to marry a papist

Legacies given on a Condition of being forfeited, if the Legatee marry without the Consent of a particular person, are not subject to the forfeiture, unless limited to an issue on breach of the Condition. —

Where a Legacy is well given.

1st A last Will being made when the Testator is presumed to be "inops Consilii" the Law regards the intention rather than the technical import of the words used to express the intention, — and it suffices any words which manifest an intention to create a Legacy are sufficient

2^d In all descriptions who may claim to be Legatee, the intention of the Testator must be sought. It has been always adjudged that Grand-Children may take under the description of "Children", if the Testator had no Child. But they are considered Children in no other Case.

And

If a man devise Legacies to all his
 Dyer 177 Children and Grand Children, it is settled that
 Co. Litt. 112 this extends only to those who were "in esse"
 The Ch. 470 at the time when the will was made. -
 Legacies ~~thereby~~ this depends upon the words, or rather the intention
 Property given to be equally distrib-
 ed, among the Testator's relations, or among
 Gallop 251 his relations of a good moral Character (Re)
 2 Vesey 527 is to be distributed according to the Stat. 17.
 2 Vesey 381. Distributions, the description being so gen-
 eral as to have any effect - This doctrine is now
 fully established.

When Property is given to a number
 2 Vesey 421 of Children to be distributed according to the
 Q^o 513, direction of a particular Person named in
 the Will, the division made by that Person
 will stand unless manifestly unjust & unreasonable.

3^d It is said by "Godolphin" that in
 order to find out the Testator's meaning with
 respect to the things which he intended to
 Godolph. 4 give away, it is necessary to regard the time
 Q^o 272 when the will was made; for it is pre-
 sumed that the Testator's mind was not alter-
 ed, unless it otherwise appears by sufficient
 evidence. In another place, however, he ob-
 serves that this rule must be understood as
 the Testator makes use of the words in the
 present

present or future tense, and that if he doubt
 whether they refer to the time past or the
 time to come, they shall be understood to be
 taken to be given to come.

But it is now settled that by a gift
 in a Will of "all the Testator's personal prop-
 erty," all that he had at the time of his death
 and no more, will pass whether the sum of the
 personal Estate be increased or diminished af-
 ter the making of the Will.

The rule respecting real property is,
 directly the reverse. For if the testator part-
 only, will pass as was the Testator at the time
 of making the will. Among personal
 property all being bequeathed "in a certain
 place," extends to all he may afterwards
 have in that place.

By a bequest of a particular thing
 at a certain place, the thing passes whether
 it was at the specified place or not at the
 time of the Testator's death. page, 157.

Where a Legacy shall be a Satisfaction for a Debt
 or duty.

The doctrine that obtained for
 more than a century in Eng. was that if a
 man gave a Legacy to a Creditor, it should be
 considered as a Satisfaction for the Debt if it
 were equal or superior in value, tho, not otherwise.
 This.

Hope, 163
 3 P. Wm. 533
 2 D. - 134
 2 P. Wm. 240
 2 D. - 134
 2 D. - 177
 1 Wm. 1340

This rule it was supposed was supported by the intention of the Testator, and on this supposition it stood for a long time undisturbed.

But succeeding Chancellors, rejecting this supposition, laboured hard to take Particular Cases out of the grips of this rule, and now by repeated adjudications, it is virtually abolished.

The following exceptions are taken to the rule

1st That the Legacy in order to operate as a *Specie* - an extinction of the Debt should be "in *idem genus*"

2^d That it should be payable at the same time, or at least as soon as the Debt

3^d That there be no Clause directing the previous payment of just Debts.

4th That the rule cannot apply against an illegitimate.

5th That the intention of the Testator to extinguish the Debt, by the Legacy, be apparent.

6th That it be expressly given in payment.

If several Legacies given to one person be exactly the same in quantity and quality, and in the same instrument they are not cumulative; but if otherwise, where the same Legatee is given in a Will, and in a Codicil it is cumulative, unless there be circumstances showing a contrary intention in the Testator.

A Legacy

A Legacy to a Wife or other person entitled to money from the Testator by articles of marriage Settlement, is generally considered as intended to be a satisfaction, in all or in part of what is thus due; and the Legatee may have her Choice as to what she will have yet she cannot have both -

Full. 138.
D^o 203
Ward 95.
D^o 115, 555-6.
D^o 349, 439.
Re. Wm. 424
W. Bro. Ch. 305.
3 Wm. 53+.

A Gift to the Legatee by the Testator during his life is to be considered as part of the Legacy bequeathed by the Will made previous to such Gift.

Full. 203.
Ward 95.
D^o 115.

The Ademption of Legacies.

The Ademption of a Legacy is the taking away of a Legacy which was before bequeathed.

Swink 522.
3 Bro. 470.

The Ademption of a Legacy is never to be presumed, but always proved. — Swink 522

The accidental destruction or the alienation of a Legacy may be an Ademption or not according to the Circumstances. — But it Swink 522 is not necessarily such, for the Legacy as specified it may be replaced by a similar article.

To determine whether there be an Ademption or not recourse must be had to the intention of the Testator.

The Key 25.
D^o 333-5
Lover. 205.
169 Ch. 302+.

If the alienation can be imputed for & it upon the supposition that the Testator intended.

2Yard 631 intend to redeem the Legacy it is an Ademption
 3^d 681 But if the Legacy be so lost or destroyed or
 2Bro. & 608 disposed, of that any other intention can be
 inferred, it is no Ademption. -

1Eq. pt. 302 If a Debt be bequeathed and the Testator
 Went 181 calls it in for another purpose than to take it
 Ho. Ray. 25.35. away from the Legacy, it is an Ademption

Mo. 373 If the thing bequeathed be pledged or sold
 Strong 228 by the Testator then, necessarily it is no Ademption
 22Wm 104 But if the payment of a Debt bequeathed
 10C. 328 were insisted, by the Testator, or if the Debtor
 1Am. 401 were in failing Circumstances, or if the Tes-
 1Ver. p. 6 tator were in want of money, the receipt of the
 209a 339 Debt is no Ademption
 10p. 355

But in this case the Ex^r is answerable
 for the value of it -

Swint 3334 So in many Cases where the Legacy is
 10C. 220 destroyed, or where a house bequeathed is con-
 2Wm 225 sumed by fire, and a new one erected in its
 10p. 30. stead, there is no Ademption -

If a man by Will give his Daughter
 2Wm 115 200 Pounds, and afterwards on her marriage give
 10C. 253 her the same, or a greater Sum, the Legacy will
 be extinguished

If the Testator bequeath a certain
 Sum to one of his Children, and in the same
 Swint 530 instrument give the same Sum over again to
 the

^{some} the Legate, the second disposition is but a repetition of the former.

It is laid down however as a rule to be ^{not} altered by showing a different intention that if the request be of good &c. specified to be in a particular place, they must be there at this time to give effect to the Legacy, R. 4537
Roper 379
Vol 17/129
note -
page 153

But the removal of goods out of a ship before the testators death is no ademption, Roper 39.

Abating, and Rescinding Legacies.

The Ex^r is not bound to pay any Legacy, till the Legatee gives security to refund if Debts should afterwards appear. - You are to have before remarked, no time is limited in England, within which creditors must exhibit their Claims, ag^t the Estate of the Deceased. - Wray 388
Ward 205.

If a Legatee receiving his Legacy, has ^{not} given security, to refund in favour of Debts, afterwards appearing he is not compelled to do so. It supposes that the deceased intended that there should be no question raised on principle why he ought not to refund. ^{This rule however does not operate if} the Ex^r when he paid the Legacy, were ignorant of the existence of Debts, afterwards appearing, or if he were compelled in Chy, to pay them. Judge, Reeve, supposes that an action for money had and received would lie since in such case the money is paid by mistake. Went 300,
Wray 193,
Lancash 79,
Co. 240
3 Bred 1483.

mistake and of course the Consideration fails,

28 May 193 A Creditor may come upon the assets
18 Mar. 94 of his Debtor in the hands of his Legatee by
22 Dec 265 appt in Chy. if the Ex^r be insolvent but not
28 Dec 358 otherwise
18 Mar 31 Summary Legacies shall abate in
6 Feb 467 proportion to the deficiency of assets.

If a Legacy be given to an Ex^r for his
28 Mar 484 care and pains. It has no preference but
must abate in proportion with the others

So one Legatee may compel a second
6 Mar 136 one Legatee to refund when the assets go
248 come deficient tho. there was no provision
7 Mar 360 for refunding and tho. he have still a rem-
18 Apr 112 edy agt the Ex^r and may compel him to pay
3 May 210 it out of his own pocket if he voluntarily paid
18 May 210 the assets to the other Legatee. But he can't come on the
Legacies. - Ex^r when he was appointed by Chy to pay the other Legacies; has his remedy in the
the other Legatee

Note 32.

The Payment of Legacies.

28 Mar 228 The Ex^r ought to be careful in the pay-
18 Mar 250 ment of Legacies to take a proper receipt, or
22 Dec 211 to have sufficient vouchers. Because it is hol-
18 Mar 484 den to be such an equitable demand, as
18 May 571 is not barred by the Stat^o of Limitations, tho,
18 Mar 101 after a length of time, a Legacy may be
presumed to have been paid.

So he ought to be careful to pay Legacies
into

157
into greater hands. for without a decree or
order of a Ct. of Chy. he cannot pay them, bly of 240,
over to the Father and other relations of Infants.

And if without such decree or order the Ex-^{12th Nov 285,}
ecutor pay a Legacy to the Father and Infant he does ^{56th 18.29}
it at his own risk but not if he pay it to ^{Gilb. Rep. 103}
any other Guardian. for every other gives secur- ^{3d Bar 485,}
ity, to discharge his trust. ^{169 of 300}

If a Legacy be given to the Wife. it must
be paid to the Husband - When a Legacy was ^{11th Nov 201}
given to a feme covert - who lived separated ^{Repor 90,}
from her husband. and was paid to her, and
her receipt taken. it was decided in a Bill
bro' by the husband. that the Legacy should
be paid over with the interest.

So where the Husband and Wife are divorced ^{bro Eliz 908}
"a mensa et thoro." - it has been adjudged that ^{3d Bar 485}
the Husband only, can release a Legacy left ^{Moore 655,}
to the Wife. ^{In this case the Law presumes he has suffered from}
^{on his and having is entitled to keep Legacies &c} ^{11th Nov 891,}
^{2d Nov 859,}

But this does not apply where
the property is given to the "Sole and Separate
use of the Wife."

And time be appointed by the Court ^{Repor 95}
for the payment of a Legacy. It is payable ^{Godolph. 272}
at the end of a year from the Testator's death. ^{2d Salk 1155,}
^{2d Salk 39,}
^{12th Nov 890,}
^{2d - 88.}

This rule of the English Ct. of Chy. is
copied from the Civil Law. A Legacy is pay- ^{2d Nov 31}
able

Words 199 payable to the representatives of the deceased
 Q^d - 283. Legatee at the time appointed for the original
 payment

Words 31. The person who is entitled to
 Q^d - 283. a lapsed Legacy may demand payment
 immediately after the death of the Testator,
 provided a year and a day have passed
 and no time fixed by the Testator. —

2 Salk^d 415 If a Legacy be devised generally it is
 2 Words 251. regularly to carry interest from the expiration
 Q^d - 282 of the first year after the death of the
 2 Words 307. Testator

18 Words 307 But if the Legatee being of full
 2 Salk^d 109 age neglect to demand it at that time he cannot
 2 Words 100? have interest - but from the time of the demand.

And here I should may be remarked
 the difference between a Legacy and a Debt -
 the latter of which if there be no time for pay-
 ment carries interest - whether demanded or not.

The reason of this difference is that
 the Ex^r, who is ^{only a trustee} not a Debtor,
 is not like a Debtor.
 # 2 Salk^d 104. bound to search for the person whom he owes
 Vol 3rd 246. It is sufficient if he advanced the money to
 his trust upon demand, or when demanded

2 Salk^d 415 But for a Legacy be given generally &
 1 Salk^d 215. no time ascertained for the payment yet if
 Words 251. the Legatee be an Infant - he shall be entitled

Residuary Legacies.

2d Wm 270
Atk 552
3d Bp

A residuary Legatee is a person appointed by the Testator to take the residuum after the payment of Debts and particular Legacies. Hence when the Debts and other Legacies are paid and discharged. Such residuary Legatee if any be appointed by the Will, will take the Surplus to the exclusion of all others except in Cases, where Legacies charged on Real Estate, are taken or taken for the benefit of the Heir.

Wether 32

If a residuary Legatee die before the Debts are satisfied, so that it does not appear to how much the Surplus will amount, yet the Ex^r or Adm^r of such Legatee, shall have the whole residue of the personal Estate which remains over, and not the Ex^r of the first Testator.

3d Bp 484
Palmer 409

So if there be a residuary Legatee and the Ex^r omit to put off the Testator's debts out of the inventory, or undervalue them he puts in, the residuary Legatee may file a Bill of discovery against him before he has paid the Testator's Debts.

2d Inst 33
Ward 473
2d 674
Qd 737

In what Case the Ex^r is entitled to the Surplus has been considered under another head. But if there be no residuary Legatee under the Will, and the Testator's intention be

be manifest that the Ex^r should not be denied - *12 Am 9*
 may Legate the residue is distributed at *Do - 530*
 the, the Testator died intestate *3 Do 40,*

Donatio Causa Mortis.

A "donatio causa mortis" - is a specified present made by a person in contemplation of death. *2 Do*

This gift is always conditional. For if the Donor recovers the Donor is not entitled to the property. If the Donor dies the donation vests immediately in the Donee without the intervention of the Ex^r, or any other person. *Sub page 370.*

To give effect to a "donatio causa mortis" - there must be a manual tradition of the thing given, or some act amounting to it by the Donor. *12 Am 209.*
12 Do 406-41
3 Do 357

A gift of this kind is not good as a gift creditors, but no action lies against the Ex^r, in the case he not being entrusted with the gift -

Justice Reeve is of opinion that the Creditor who claims against the Donee must bring his action against him as Ex^r, "de bonis testis". For the representation of the deceased being bound by the gift the Ex^r in *testis* Court as in the case, is bound to pay the property, and sue the Donee to recover it.

It seems that a chose in action of a negotiable nature may pass as a donatio causa mortis. *12 Am 141*
3 Do 342, 357
 Cause.

* Because the action is in *transitu* - But if it be not negotiable
may be given in the name of the donor. - The better opinion seems to be that it will
be given to the donor's estate - But "quod" - for Chy may give it
B. H. 2:14
2:14
4:11
the assignment as in other cases. Note 33rd

Distributions.

** as which goods
were sold & clothed
Saw on the subject*

Distributions.

No 73. After this payment of Debt, and Legacies the
Court is bound to make distribution of the
Personal Property.

The mode of distribution is settled by the Stat^s 22nd and 23rd of Cha^s 2nd, which directs that after the payment of Legacies and the Widow's share the Surplus shall go to the Children and their representatives, and if there be no Children to the 'next of kin' and their legal representatives.

No representation is permitted among Col-
 colorists, beyond Brothers and Sisters Children.

At the Ecclesiastical Ct had the man-
agement of deceased personal estates, the rule
of the Civil Law was adopted to determine who
was the "next of kin". Painted out in the Act
of Distributions. A distributive share
exists in an infant "in ventre s^o m^or^o" under
the Act of Distributions. —

The distributive share vests in the
 heirs of the intestate at his death, and of
 course is transmissible to the claimants
 before the distribution, 88-

No distribution is made till after the expiration of a year from the death of the intestate, 2 Ves. 213, 3d An. 56 & 60.

The personal estate first goes to the "next of kin," in the descending line, and their legal representatives, i. e., to Children, and their issue "ad infinitum"; this is the law in all the States, -

So long as any of the old stock remains in any of the lineal degrees the Estate goes "per stirpes," "per representationis" - But after the old stock is extinct the Estate is distributed "per capita," and not "per stirpes" Some how- ever contend that the distribution in this case is "per stirpes." Lovelace agrees to the rule, - but Judge Reeve supposes that when there is no representation, as in this case, the distribution cannot be "per stirpes" -

Of persons related in an equal degree, to the deceased, no preference is given to one more than another, except that those in the descending line exclude ascendants and collaterals, whatever may be the degree of kindred, infra

In the Civil Law proximity, not the quantity of blood is regarded in calculating the degrees of kindred; - 323

The "per representationis" among Catholics - all extends no farther than to the Children of brothers and Sisters. Beyond this even Children may claim in their own right, - only

1st An. 25, 594
3d An. - 50
L. 16 250
Wes. 203-5
1st An. 454
2d An. 54

If then the Brothers and Sisters of the Proprietors be dead, and a part of the Children also, whose nephews and nieces who survive shall ^{take} the whole estate, to the exclusion of the grand nephews and grandnieces of the Proprietors, & also the exclusion of the grand-children of the Brothers and Sisters of the Proprietors.

1. Atk's 458.

* In page 171-2
- inserted -

A Statute of James 2^d places the Brothers and Sisters in the same rank with the Mother both in the same degree in the distribution of personal property. But this degradation of the mother takes place only when there are Brothers and Sisters and their Children living, -

Atk's 458.

1. Vent 310.

Q. 333

Q. 423

Stiles, 74

333.

* But if it were

of Real property

How she would

take her half

In the distribution of personal property. no distinction is made between the whole and half blood; the Civil Law which regulates the distribution according to proximity, and not quantity of blood.

If the Father of the intestate be living the Mother takes nothing because she would be his wife, and his wife would be his husband.*

If after a Divorce of the Father & Mother a vinculo matrimonii, by Parliament for Improvement Causes, the Son die his Father and Mother being still alive it is doubtful whether

Agood E.g.

the mother would be entitled to any thing or not; But as the Father might be his personal property has ceased in this case. it would seem that

on

and principle she would have a good claim. -
If the Divorce was only "a mensa et thoro" -
she could not claim any share of the personal -
or property of her children while her Husband
was living, because the husband right to her
property still continues tho. after her husband's
death. She might And in all cases where
the marriage was not "ab initio" void. she is
entitled to a share after her Husband's death.

The Brother according to the English adju- 3d Ed. 725.
victions refers to the decision of the Grand - Gosnell 253.
Jurors. but are these decisions reconcilable 4
to the governing rules? - See page 171 example 2d Ed.

Children "in ventre sa mer" are by the 2d Ed. 115
Civil Law as well as by the Common considered
as being "in ipso" and capable of taking prop- P. 17, 50.
erty according to the rules of descent and distrib- 2d Ed. 274
ution. - And in favour of such Infants, and 710-11.
injunction may be granted to stay W. & T. * If a son or widow etc.
and third are under the
discretion and the law
has no right of the estate
if there are none in
the descending line
the father or mother
(i.e.) shall & the law
be among the col-
lateral kindred -

Cases Distributed Note 34

Case 1st John Siles died leaving a Wife and
three Children. - Answered. - One third goes to his
Wife, and the remaining two thirds to his three
children each taking an equal share.

Case 2nd John Siles died leaving no Wife
but three Children. - Answer,

Answer. - the Estate is divided, "per Capita" among the Children, -

Case 3rd John Stiles died leaving two Children and the Son of a third Child who is dead.

Answer. the two Children take each one third, and the Grand-Child the remaining third, as the representative of his Father, -

Case 4th John Stiles died leaving a Child C, his Child A is dead, who left a Child D, and his Child B is dead leaving Children E and F.

Answer. - In this Case C the Child of John Stiles takes one third, being issue of the deceased, D the Grand-Child takes another third, being the legal representative of his Father A, and the other third is divided between the Children of B, as his representatives, for representatives take "per Stirpes" and not "per Capita", -

Case 5th John Stiles died, and his three Children are dead, but A leaves a Child D, - B leaves E and F, and C leaves G and H.

Answer. - The old stock being extinct representation ceases, and of course the Children of A B and C take "per Capita", all standing in the same degree.

Case 6th John Stiles died leaving two Children B and C, his Child A is dead, and so is his Child D, who leaves H and I.

Answer. - The Children B and C take each one

one third, and H and S the remaining third as cop-
representatives of this Grand-Father, A D

Case 7th John Stiles left a Wife & at
no issue, his Father Reuben, and his mother
Mary; his brothers and Sisters of the whole blood
Gom B. Dick, and Sally; of the half blood Sam Stiles
and Susan How B, and his uncles George, and
Edmund Stiles? -

Answer, his Wife takes one half of the
Estate, according to the Stat. there being no issue
and the Father the other half.

Case 8th The only pretensions living are Gom
Dick and Sally, brothers and Sisters of the whole
blood; Sam Stiles and Susan How B. brothers and
Sisters of the half blood, and his uncles, George and
Edmund.

Answer, the brothers and Sisters of the
half and whole blood, take the Estate "per Capite"
in exclusion of the uncles, they being in the second
while the uncles are in the third degree.

Case 9th The same case as the last - only
Sam and Susan are dead, without issue, and
so is Tom dead, but he left a child M.

Answer, Dick and Sally are entitled to
two thirds of the Estate, being the "next of kin"
to the deceased; M the child of Tom is entitled
to the other third, being a legal representation
of his Father, Gom.

Case

Case 10th All the Brothers and Sisters of John Stiles except Sally are dead. But all the Children of Tom, and N and O the Children of Dick, are living. -

Answer. - In this Case Sally takes one third as next of kin; All the legal representatives of Tom another third, and N and O the residue being the representatives of Dick.

Case 11th All John Stiles's Brothers and Sisters are dead. Tom left a Child M. Dick left Children N and O, and Sally D, R and B.

Answer. In this Case the estate being extinct representation ceases, - and then John Stiles, under George and Edmund, together with the Children of Tom Dick, and Sally, divide the Estate "per Capita" being all in the third degree.

Case 12th Same Case as the last - only the names George and Edmund are dead, without issue. -

Answer. Here all N O D R and B being the next of kin divide the Estate "per Capita"

Case 13th The Same as the 12th only M is dead leaving 1, 2, 3.

Answer. Here N O D R and B take the whole Estate in exclusion of the Children of M because representation among Collaterals extends -

tends -

extends no farther than to the third degree

Case 14th M is dead leaving 1. 2. 3. So, M O P Q are dead. M leaving 4. P leaving 5. O P 7. 8 and 9. and 2 10. D D

Answer. R takes the whole Estate as next of kin, to the exclusion of the Children of M N O P Q. -

Case 15th R is dead leaving 11. 12. 13. 14.

Answer. In this case the Children of M N O P Q and R, divide the Estate "per Capita" being the next of kin to the deceased.

Case 16th George and Edmund left issue; George left 15, and Edmund 10 and 17.

Answer. The Children of George, and Edmund share the Estate, with those of M N O P Q and R, they being all in the same degree.

Case 17th The only relations living at John Stiles's death, are his Grand-Father, Solomon, and his Brother Tom. -

Answer. According to the General Solomon and Tom would divide the Estate equally; but this is an exception, and Tom inherits the whole Estate in preference to the Grand-Father Solomon. # see page 167

Case 18th John Stiles died leaving his Grand-Father Solomon, his Brother Tom, and his Mother Mary. -

Answer -

*supra, 100.

Answer. Had it not been for the Stat^e 1st of James 2nd, the mother would have been entitled to the whole Estate being in the first degree but now she is entitled to an equal share with Tom. The grand Father Solomon is excluded as in the last Case.

Case 19th The same as before only Tom is dead without issue.

Answer. The mother takes the whole Estate; so the Stat^e operates again here only when there are brothers or sisters of the person or their legal representatives.

Case 20th The only relation of John Stiles is Tom but his Sister, Sally, is born after his death.

Answer. Tom and Sally take the Estate "per capita" for posthumous Children are considered "in esse" and take equally with others.

2 Comyns 204

1 Wms 134

2 Ventris 302

1 Comyns 254

2 Hk 406

Ample 28

2 Vesey 35

p

p

p

p

p

p

p

p

p

p

p

p

Distribution is Compellat^e in Chy.

It is a general rule that personal property is to be distributed according to the Law of the Country in which the testator resided, at the time of his death. But Real property is always to be distributed according to the Law of the Country where it is situated.

Of Advancement.

By Stat Ch^a 2nd every Child except the Heir Apparent, if he have received an advancement from the Father during his life, shall in

order

or to be entitled to a distributive share in
on the Set of Distributions, being what he
has thus received into hotch-pot. **NOTE 35**

This rule operates however only in those
cases in which the Father dies intestate, as to
the whole of his property, and thus said if he
die intestate as to a part of his personal prop-
erty a Child advanced by him in his life time
need not bring such advancement into -
hotch-pot, in order to have a distributive -
share, of the part as to which he is intestate, **2 W. 435**
2 B. 430,
2 R. 434
2 Eq. 444
2 V. 538,

Whatever is given for a marriage set-
tlement is an advancement. **NOTE 36**

It seems that the nature of advancement
does not depend where a man has property, **2 W. 435**
of which he is ignorant or which he does not
rely on in his Will,

Where a man gives a greater legacy
to one Child than to another, and dies intestate
as to part of his Estate, this is not in the
nature of an advancement, for an advance-
ment must be made in the life time of the
Testator.

Devastavit.

Any act of the Ex^r or Adm^r by which the
assets are lost or impaired, Subjects him to a
devastavit, on which Ex^r goes de bonis propriis
it is as releasing Debts at a discount. Submit
ing -

Submitting to arbitrament, accepting up what
 what was due expending on necessary & large
 sums for funeral charges, suffering the prop-
 erty of the deceased to be injured, & destroyed. —

Nov 37

Ex parte
 Page 116

When in such cases there is a bond given
 he may be charged on the bond.

Ex parte 1520. If there be two Ex^{rs} one is not liable
 for a devastavit by the other, unless he has
 directly or indirectly contributed to it; for a
 devastavit is in the nature of a trespass. —

If there be two Ex^{rs} one having a power
 and the other none, and the former commit
 a devastavit, both may be sued in the first
 instance in the usual form and judgment may
 go agt both. "But if no assent be found." —
 Salk² 318. "non est" will be returned, and a "Scire Facias"
 2 Bro² 114. will go agt both, & then judgment will go agt
 the receiver only. If both Ex^{rs} have signed
 receipts, and one only has in fact received, both
 are liable to creditors, & at the receiver only it
 is said to be legally.

Actions by and against Ex^{rs}

In some cases the Tortfeasor or intestate might
 have sued where the Ex^r, or Adm^r cannot.

There are also some cases where the Tort-
 feasor or intestate might have been sued, but
 the Ex^r, or Adm^r cannot. The rule

The rule of discrimination between the cases where the Ex^r or Adm^r may be sued, on account of the Testament, and those in which he may not has been thus laid down.

"That the Ex^r or Adm^r is liable for the Contracts of the deceased but not for the Torts."

But neither branch of the rule is strictly true. For there are cases where the Ex^r is not liable for the Contracts, of the Testament, &c. and others where he is liable for his Torts.

The rule now established as to Torts appears to be this. If the Testament or intestate have benefitted his Estate by the Tort the Ex^r or Adm^r is liable; But if the Estate have not been benefitted by the Tort, the action does not survive ag^t the Ex^r or Adm^r, even tho' the Estate of the party aggrieved has been injured by the tort.

Justice & Reason apprehend however that the enquiry ought not to be whether the party have been benefitted, but whether a wrong has been injured by the notorious act.

At & the Ex^r or Adm^r was not lia-
ble for any tort committed by the Testament or
intestate,

DeBee 239
D. - 445
1 Conyn 241
Wentw 30,

The present liability of Ex^rs and Adm^rs is derived from the equity of the Stat. 4th of Edward 3rd. ^{as reported} de Bonis, as portaled in Vita Testatoris. By Equity this Stat was extended to all Torts committed ag^t property generally.

In the

In the old roll, the word is "arbitrarius".
 3d Rep. 549 But the word in the printed Stat. is "bonis".
 Cooper 372 Doubted, does this Stat. impose a liability on Ex^{or},
 this last contains all the law on the subject or merely give them a right of action?

When an right of recovery for the tort
 182d 30, of the Testator is interdicted. & Davies says the
 4th Ed. 403 Ex^{or} or Adm^{or}, however the action is brought against the
 Salt 314. Ex^{or} must not sue in tort, but in Contract.
 2d Rep 971 and the usual mode of recovery is by assumpsit
 D^o - 1504. which cannot be traversed.

Cooper 372 If an action which would survive
 Co. Gliz 377, agt. the Ex^{or}, be brought agt. the Testator, and the
 2d Ed. 1089 latter die pending the suit, the action does
 9 Coke 87, not abate. D

If in this case the action be such
 as would not survive it must abate. If there
 fore no action be brought agt. the Testator on a
 right of recovery which would survive agt.
 the Ex^{or}, and the action sound in tort, the suit
 must according to the strictness of principle
 abate and the Plff. must resort to an action
 sounding in Contract agt. the Ex^{or}.

And when the action is such as will survive agt. the Ex^{or}
 1st Ed. 283 a "Sine Facies" must issue to summon the Ex^{or},
 1st Ed. 182 to answer the suit. To a "Sine Facies" agt. the
 1st Ed. 182 Ex^{or} he can't plead any matter which might
 1st Ed. 182 have

hand & was pleaded in the original action. — *what title one is appointed. —*

It has also been observed that there are some contracts which will not survive agt^t the Ex^r. — *1 Levin 429*

The rule of discrimination in this case is that when as is usually the case the contract is such that the Testator has received or is to receive any Consideration from the other party, on performance of the contract, the Ex^r is liable. But when according to the contract the Testator was ~~not~~ to receive any Consideration, moving from the other party, & a Compensation arising solely from the performance of the contract and in which the other party was not interested, if he failed of performance thro, mere negligence his Ex^r is not liable. As if an Officer who, is to receive legacies, fails the execution of a precept, & thro, negligence to execute it. —

Formerly no action survived agt^t the Ex^r in those cases in which the Testator might *Co. Plz 500* wage his Law,

In some instances also the Ex^r cannot maintain an action which the Testator could. *2 Bai^o 445*

The rule is this; that if the Tort Committed agt^t the Testator, has injured his Affairs, the Ex^r may maintain a Suit for the recovery of Damages; otherwise he cannot —

When the Suit is commenced by the Testator.

600 Eliz 377.
Salk 108.

9 Coke 87.

* However was no pre-
vision made by
the Statute which
it is his duty to
make the party die,
and the party die,
and the party die,
and the party die,
and the party die,

It is W^m

and Mary

600 Eliz 377.

Salk 108.

9 Coke 87.

114 Rep 200.

Q^u 280.

114 Rep 520.

De Chancellor of the Stat. of Limitations.

Hardwicke seems just he may suffer judge to go against

analogy, 375.

Whole 104007.

Notes 128.

Ordinary 105-6.

2. Stat 431.

Testator. and is of such a nature that it would
Survive to the Ex^r, and the Testator is to-
tal party - the Ex^r may make himself a party
to the action by suggesting the death of
the Plff. and entering his name instead of the
Testator upon the record. -

* But - According to the Stat^e of William and
Mary. if a Plff. in his Ex^r must be notified
in such case he becomes a party to the Suit
and judge goes against him as Ex^r. -

But on the other hand if the Plff. were
dead, and the Ex^r neglected to enter his name
the Defendant would be prejudiced. - This is a
case omitted. -

The Ex^r may sue in his own name
where the cause of action is founded on a Con-
tract of his own. & has occurred since the death
of the Testator. -

The Ex^r when sued by a Creditor
of his Testator is not obliged to take advantage
of the Stat^e of Limitations. But if he thinks the
Hardwicke seems just he may suffer judge to go against
analogy, 375. him without being guilty of a deviation. -

Whether the Ex^r is obliged to take ad- van-
tage of the Stat^e of usury, is a point on which
the English Authorities disagree.

It is settled that in Gen^l he is obliged to
avoid.

excused himself of any illegality in the Consti-
tution of a Contract. But it is doubted whether
or this rule extends to Debt which in honor
and conscience ought to be paid. The Ex^r is
not perhaps warranted in waiving all those le-
gal advantages which the Testator himself might

A Court for money had and received to the
use of the Ex^r, as such, may be joined with one 35 Rep 559.
for money had to the use of the Testator

But a Poff Court joined in the same
Declaration, a Court of action which accrues
to him as Ex^r, with one which he had in his
own right

75 Rep 489
Str. 1271.

As that for which the Ex^r sues
will when recovered be assets in his hands, he
must sue in his own representative capacity.

28 Rep 128
7 Q - 359

Quere. - If the Ex^r in all cases of this kind
to sue as Ex^r; or does the rule mean that in
all cases he sues in this way, he must pay Costs?

25 Rep 128
5 Q - 234

It cannot mean that he is obliged to sue
as Ex^r, nor is he exempt from paying Costs
in all such cases. ^{I suppose the remark is that the rule is not so that}

75 Rep 358
15 Show 57
25 Rep 550

When a promise is made to an Ex^r
as such, he may sue as Ex^r.

15 Rep 487

He and those to bind himself as such he
is personally bound and can't plead plene Dominis - 15 Rep 691
"tenuis" I suppose creates the personal liability. Where is the consideration unless he has
bound himself in
an action contract
most?

It is a general rule that when an Ex^r
sues, most?

Sues and is defeated, he is liable to no Costs,
and by Stat. Henry 8th which governs on this
subject - those only were made liable to Costs
who sued in their own right. - Ex. therefore
as they sue in the right of another, do not
come within the provisions of this Stat. -

* Hutton 54
Woolley 503.
Hards, 165
Hawden 183.

Simp - 682
Woods 94
Doe - 181.
Kestris 92.

But this last rule applies only to Offs who
are Ex. * In almost all the States excepted that making them liable. -

There is however one case in which
an Ex. or who, Offs, shall be liable to Costs. -
This is when he brings his action in his own right
as for a Conversion, or trespass in his own time,

If one of two or more Ex. die the
Survivors may act for it is an Office and not
an authority.

What things are 'personal property and
assets'.

It is a Gen. Rule that all personal
property goes into the hands of the Ex. and
the Real into the hands of the Heir. -

But there are some things which appear
to be personal property which go to the Heir,
And on the other hand, some which appear
to be Real which pass to the Ex. -

Thus Tithes in a parson and Dues in a parson
go to the Heir. but if the Cattle had been
tamed they would have gone to the Ex. -

To too -

So too, annual Rent on Land tho. deemed by Personal Property, goes to the Heir; *Wile 2d, 123*
Wheat growing at the death of the Tenant goes *D^o 145*,
as into the hands of the Ex^r,

"The disposal of the residue of an Estate *1 Good Exp^r*
per antea &c." when the Tenant dies during *this is not subject of*
the Continuance, goes to the Ex^r. *property, which the C*
Land has not previous

Emblements are sometimes considered as Real *if you, it shall go -*
and sometimes as Personal Property. They pass *By the Stat^e of this,*
of course by a deed of the Land, and if an injury *it goes to some great*
be done to them, it is a Trespass. But as between *Lord of the Fee.*
the Heir and the Ex^r, emblements are always,

regarded as Personal Property, and also as be- *Good Exp^r 55*
longed to the Land and the Tenant. When the estate *D^o 68*
terminates at an uncertain time, "Quare" as to roots the *23 B Com^s 123*
digging of which injures the freehold? They go *1 Good Exp^r*
to the Ex^r. I presume, as well as to the Heirs, *Exp^r 594*
for they are emblements, not fixtures. *Bulla 34*
Stat^e 1142

By the old Law anything affixed to the *Exp^r 594*
freehold however slight it was considered part of *Bulla 34*
the freehold, or realty. *Stat^e 1142*

But this rule is now clearly reversed for *Deba^e 410*
whatever is merely affixed to the freehold, is *D^o 418*
regarded as Personal Property, unless the dep^r *D^o 429*
location, would materially injure that to, *3 Att^r 13*
which it is affixed, -

The rule as now established holds equally be-
tween Landlord and Tenant, and Heir and Ex^r. +
Certain

Warr 412-
20th Sep 220
10th Sep 283

Certain Chattels are by Custom of England transmitted like Real Property by descent and are called "heir-looms". If a Testator or intestate die possessed of a term for years, it belongs to the Ex^r or Adm^r. - If a Lease for years comes to the hands of the Ex^r, he must annually add to the inventory the surplus of the profit if any after allowing for the expenses spent, and the rule is the same with respect to all accruing profits. If the Testator dies in Dec^r and a Lease the rent on his death goes to his Heir. All reversions however distant of time are real assets in the hands of the Heir and Execution may go against him immediately to be levied when they happen. Equities of Redemption on the Mortgage of the Testator are in Equity real assets in the hands of the Ex^r but not at Law.

If the Testator grant an Estate in "Reversion" or "Radium" - the future estate of the Heir is a Sett^l. when it shall happen. If the Testator be Mortgaged, or give an estate "in Radium" - the estate on his death is a Sett^l in the hands of the Ex^r, and he may compel a foreclosure

The Heir also in this case may compel a foreclosure if he will pay the money for which the Land is pledged, but not otherwise.

That Species of personal Property called
Daggers

paraphernalia regularly does not go to the Widow or Ex^r. The first kind of paraphernalia - * to pay debts - new debts in the Ex^r. The second only on - not received - deficiency of assets provided. * This subject has been considered under another title, as in Baron and Feme. - 40 C. 1. 87-8

Administration Bonds.

The Adm^r must give bonds for the faithful discharge of his trust, and the Ex^r are Compellable by Ch^y to give Caution, i.e., Security by being Trustees. - No person can be an Adm^r until he is 21 years of age the reason assigned is that before that time he can't give bonds - But Judge Keene remarks this is not a sufficient reason, for - It seems to be the case that when bonds are required of infant Ex^rs - they are binding notwithstanding the principle of the Com^o Law. - 5 C. 29^a 3 B. 121 440, 446, 449, 451, 457, 461, 464, 467, 470, 473, 476, 479, 482, 485, 488, 491, 494, 497, 500, 503, 506, 509, 512, 515, 518, 521, 524, 527, 530, 533, 536, 539, 542, 545, 548, 551, 554, 557, 560, 563, 566, 569, 572, 575, 578, 581, 584, 587, 590, 593, 596, 599, 602, 605, 608, 611, 614, 617, 620, 623, 626, 629, 632, 635, 638, 641, 644, 647, 650, 653, 656, 659, 662, 665, 668, 671, 674, 677, 680, 683, 686, 689, 692, 695, 698, 701, 704, 707, 710, 713, 716, 719, 722, 725, 728, 731, 734, 737, 740, 743, 746, 749, 752, 755, 758, 761, 764, 767, 770, 773, 776, 779, 782, 785, 788, 791, 794, 797, 800, 803, 806, 809, 812, 815, 818, 821, 824, 827, 830, 833, 836, 839, 842, 845, 848, 851, 854, 857, 860, 863, 866, 869, 872, 875, 878, 881, 884, 887, 890, 893, 896, 899, 902, 905, 908, 911, 914, 917, 920, 923, 926, 929, 932, 935, 938, 941, 944, 947, 950, 953, 956, 959, 962, 965, 968, 971, 974, 977, 980, 983, 986, 989, 992, 995, 998, 1001, 1004, 1007, 1010, 1013, 1016, 1019, 1022, 1025, 1028, 1031, 1034, 1037, 1040, 1043, 1046, 1049, 1052, 1055, 1058, 1061, 1064, 1067, 1070, 1073, 1076, 1079, 1082, 1085, 1088, 1091, 1094, 1097, 1100, 1103, 1106, 1109, 1112, 1115, 1118, 1121, 1124, 1127, 1130, 1133, 1136, 1139, 1142, 1145, 1148, 1151, 1154, 1157, 1160, 1163, 1166, 1169, 1172, 1175, 1178, 1181, 1184, 1187, 1190, 1193, 1196, 1199, 1202, 1205, 1208, 1211, 1214, 1217, 1220, 1223, 1226, 1229, 1232, 1235, 1238, 1241, 1244, 1247, 1250, 1253, 1256, 1259, 1262, 1265, 1268, 1271, 1274, 1277, 1280, 1283, 1286, 1289, 1292, 1295, 1298, 1301, 1304, 1307, 1310, 1313, 1316, 1319, 1322, 1325, 1328, 1331, 1334, 1337, 1340, 1343, 1346, 1349, 1352, 1355, 1358, 1361, 1364, 1367, 1370, 1373, 1376, 1379, 1382, 1385, 1388, 1391, 1394, 1397, 1400, 1403, 1406, 1409, 1412, 1415, 1418, 1421, 1424, 1427, 1430, 1433, 1436, 1439, 1442, 1445, 1448, 1451, 1454, 1457, 1460, 1463, 1466, 1469, 1472, 1475, 1478, 1481, 1484, 1487, 1490, 1493, 1496, 1499, 1502, 1505, 1508, 1511, 1514, 1517, 1520, 1523, 1526, 1529, 1532, 1535, 1538, 1541, 1544, 1547, 1550, 1553, 1556, 1559, 1562, 1565, 1568, 1571, 1574, 1577, 1580, 1583, 1586, 1589, 1592, 1595, 1598, 1601, 1604, 1607, 1610, 1613, 1616, 1619, 1622, 1625, 1628, 1631, 1634, 1637, 1640, 1643, 1646, 1649, 1652, 1655, 1658, 1661, 1664, 1667, 1670, 1673, 1676, 1679, 1682, 1685, 1688, 1691, 1694, 1697, 1700, 1703, 1706, 1709, 1712, 1715, 1718, 1721, 1724, 1727, 1730, 1733, 1736, 1739, 1742, 1745, 1748, 1751, 1754, 1757, 1760, 1763, 1766, 1769, 1772, 1775, 1778, 1781, 1784, 1787, 1790, 1793, 1796, 1799, 1802, 1805, 1808, 1811, 1814, 1817, 1820, 1823, 1826, 1829, 1832, 1835, 1838, 1841, 1844, 1847, 1850, 1853, 1856, 1859, 1862, 1865, 1868, 1871, 1874, 1877, 1880, 1883, 1886, 1889, 1892, 1895, 1898, 1901, 1904, 1907, 1910, 1913, 1916, 1919, 1922, 1925, 1928, 1931, 1934, 1937, 1940, 1943, 1946, 1949, 1952, 1955, 1958, 1961, 1964, 1967, 1970, 1973, 1976, 1979, 1982, 1985, 1988, 1991, 1994, 1997, 2000, 2003, 2006, 2009, 2012, 2015, 2018, 2021, 2024, 2027, 2030, 2033, 2036, 2039, 2042, 2045, 2048, 2051, 2054, 2057, 2060, 2063, 2066, 2069, 2072, 2075, 2078, 2081, 2084, 2087, 2090, 2093, 2096, 2099, 2102, 2105, 2108, 2111, 2114, 2117, 2120, 2123, 2126, 2129, 2132, 2135, 2138, 2141, 2144, 2147, 2150, 2153, 2156, 2159, 2162, 2165, 2168, 2171, 2174, 2177, 2180, 2183, 2186, 2189, 2192, 2195, 2198, 2201, 2204, 2207, 2210, 2213, 2216, 2219, 2222, 2225, 2228, 2231, 2234, 2237, 2240, 2243, 2246, 2249, 2252, 2255, 2258, 2261, 2264, 2267, 2270, 2273, 2276, 2279, 2282, 2285, 2288, 2291, 2294, 2297, 2300, 2303, 2306, 2309, 2312, 2315, 2318, 2321, 2324, 2327, 2330, 2333, 2336, 2339, 2342, 2345, 2348, 2351, 2354, 2357, 2360, 2363, 2366, 2369, 2372, 2375, 2378, 2381, 2384, 2387, 2390, 2393, 2396, 2399, 2402, 2405, 2408, 2411, 2414, 2417, 2420, 2423, 2426, 2429, 2432, 2435, 2438, 2441, 2444, 2447, 2450, 2453, 2456, 2459, 2462, 2465, 2468, 2471, 2474, 2477, 2480, 2483, 2486, 2489, 2492, 2495, 2498, 2501, 2504, 2507, 2510, 2513, 2516, 2519, 2522, 2525, 2528, 2531, 2534, 2537, 2540, 2543, 2546, 2549, 2552, 2555, 2558, 2561, 2564, 2567, 2570, 2573, 2576, 2579, 2582, 2585, 2588, 2591, 2594, 2597, 2600, 2603, 2606, 2609, 2612, 2615, 2618, 2621, 2624, 2627, 2630, 2633, 2636, 2639, 2642, 2645, 2648, 2651, 2654, 2657, 2660, 2663, 2666, 2669, 2672, 2675, 2678, 2681, 2684, 2687, 2690, 2693, 2696, 2699, 2702, 2705, 2708, 2711, 2714, 2717, 2720, 2723, 2726, 2729, 2732, 2735, 2738, 2741, 2744, 2747, 2750, 2753, 2756, 2759, 2762, 2765, 2768, 2771, 2774, 2777, 2780, 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Appendix.

This is provided in Conn^t and some other States by Statute.

Note 2 The difference is this, formerly if Land were devised to be sold by an Ex^r, to pay Debts it was legal a sale, but when devised to be sold by any other person they were equi^{table} sales. But this is not now the case. They are now equi^{table} sales in both cases. So, there are a great number of Contrary authorities, and in the last, &c.

Wes Chy 135.
Do to 140
Co. Ex 112
note -

Note 3 - Therefore the Special Creditor can obtain their Debts without going to Chy as they are legal a sale to pay them. As when a person dies, his Special Creditor might come on the Executor and take the Land for such sum as would pay the Debt - he could not take it in fee. But in case they were devised, they formerly were not liable in the hands of the Devisee. But now by Stat^{ute} they are made liable and may be taken, and therefore they are legal sales. **Note 3.** Whenever you have to go to Chy. to obtain your demand it is equi^{table} sales.

Note 4. This rule requires some explanation; it does not mean that the Ex^r is not bound

bound for a Debt arising after the Testator's death. for he is bound. Suppose the Testator covenant that his Wife shall pay £10. no action will lie ag^t the Wife. for the sum, the Ex^r is bound. Or if a man binds himself in a bond that at his death he will leave his Wife £100, which bond he entered into before marriage, and the Testator was not to pay this from the very condition of the bond. But the Ex^r must pay it. for it is all fair and there is a good consideration. — all that the rule means is that the Ex^r is not bound to pay a Debt which the Testator did not owe, and was not bound, or ought not to pay. The Ex^r can't be bound to pay a Debt without consideration, which the Testator did not owe, tho, the Testator might bind himself without consideration.

Note Bth. The Infants may transact for themselves for other than the Ex^r of themselves: this originated thus: the whole business of managing Estates arose from the Spiritual Courts, and they considered the persons at 17. at age for this purpose, and almost all the States in U.S. have adopted the Civil Law in Cases of this kind, and also in some other Cases as when Infants may consent to marriage. &c. I mention this for Judge Reed. because the different Op^s in that Country have adopted different modes & it might appear to you strange to see the difference in the Books.

Note 6th But it is now clearly settled
say Judge Reed that she may make a gift
about because it affects not his marital right
it is not his property -

Note 7th And then says "Judge Reed"
would do very well without Lord Coke's reason
that an Ec^l is liable to be excommunicated
for misdoings and as a Corporation has no
soul, it can't be excommunicated! -

The latter reason Mr Gould thinks is the sub-
stantial one, for a sole Corporation can be
an Ec^l, because it can take the oath, But
Judge Reed says, he does not know how a sole
Corporation can be an Ec^l, in his Corporate Ca-
pacity - it is without the person composing the
sole Corporation might be an Ec^l, in his pri-
vate Capacity, like any other individual. But
how can he be in his Corporate Capacity? -

Note 8th The reason advanced why an
alien enemy cannot sue is that he withdraws
the property into the enemies Country. - but this
is not the case when he acts as Ec^l, he then
acts "in amicitia"

Note 9th But Judge Reed thinks this
is not the correct reason. for if he could not give
a sufficient bond himself, he might procure
other persons to do it for him which would certainly

by
p

certainly as equally as well. But Judge Reed
thinks the point is that a person at that age is
not supposed to have discretion. In *Coker*, not
only *Tom*, but *Ed*, likewise must give up order. -

Note 10th And there are others in the dif-
ferent States of the U.S. under different names
who attend to this business and act in a dis-
tinct capacity from Courts of Justice. -

Note 11th It may be that there are no
provisions to be found where a monaster is interested
in that case the Law points out what is to be
done with it. This happens more frequent-
ly with illegitimates, or Bastards who except
they have issue can have no relations. There
is no provision by Law what shall be done
with the Estate in such cases & in England
the thing is entitled to stay usage. But there
are many provisions made in all the States of the U.S.
by Statute. Yet Judge Reed says he has known lots
that in one or two of the States there is no pro-
vision made, and then he supposes any person
may take the Estate as it is "gains hereditas".

Note 12th But the *Law* came as the
Bishops had done before; kept all and the prac-
tice continued till there was a solemn decision
had before the Courts and they determined that
"there was no remedy" and thus the *Law* retained
the Estate. -

Note 13¹⁶ - and therefore they were enabled to retain the whole of the Wife's Estate, and must give it to the next of kin. I understand this says Judge Reed because it may be very important as to the question in the U.S. Some States say they may retain all the Wife's property, others have done nothing about it. Judge Reed thinks that after he has paid debts he ought to pay it over to the next of kin, on principle. Now, how can he strip out the Wife if the Husband does not reduce them into possession during Coverture he cannot hold them after her death, and he must pay them over. Altho. Judge Reed says it seems clear that there is no right to hold, yet the Stat^e of Ohio, regulates it - and the reason is that he is considered in the nature of a trustee, Legation -

Note 14¹⁸ In some of the States they appoint another altho. he does not appear. In Conn^t. if he does not appear they fine him £5 per month; not on account of his non acceptance, but rather for his non refusal or because he will not attend a great deal to the citation.

Note 15¹⁸ But this was long after we emigrated to this country and therefore the Stat^e was not adapted here. In Conn^t a "Sequestration" may be issued without any Statute creating it.

Note 16. Mr Gould had sent to ques-
tion "Comyns Digest" as not being a good au-
thority of itself. But it is laid down by S.
Mansfield, and Judge Reeves is of the same
opinion, that "Comyns" is a good authority. Also
by S. Henry - 3 D. Rep. 531. -

Note 17. Going on the old authorities
then what is to be done? The Adm^{ty} was appointed
ad when there was a Will. he has done a great
deal has paid Debts Legacies and Funeral Charges
which the rightful Ex^r should have paid and the
Will is proved by the Ex^r - his Adm^{ty} is revoked -
and the Ex^r sues him as a trespasser. he will not
recover vindictive damages the Adm^{ty} has acted
fairly, as far as he has gone the Ex^r will
only recover nominal damages. But you ask
what is the form of action? Why if the author-
ity is from a competent Ct. he may bring an
Action of A/C. and then he will recover what he
has in his hands; but if he sues him as a tres-
passer he will only recover nominal damages
it is not important thus far. - But it is in this
Case. - Suppose the Ex^r comes on the man who
has once paid the Adm^{ty} - and the Adm^{ty} is a
beggar and the man if he has to pay it again
can't recover from the first Adm^{ty} for he is a beg-
gar, and if he would sue him he would get the
consequence!!! a loss. - But the Equity is
Equal

equal, either one or the other must ~~lose~~. The
 Policy answer is I paid it to a person having
 authority, from a competent jurisdiction and
 policy requires, that we should never make an
 act void done under competent authority - I
 consider says Judge Reeve, the man who paid
 the money, is as principal the safe person &
 that he should not be bound to pay it again.
 - But the authorities are the other way.

Note 18th - Judge Reeve says, there is
 no real distinction that I can discern any
 reason for it. But such is the Law. ¹⁸

Note 19th You will observe the joint and
 joint liability of Ex^{ors} extend only as far as they
 have assets. But it ceases immediately as to each
 creditor the wrong of one, as for an action amount-
 ing to an overpayment. - For the remedy is to have
 "bonis propriis" and it should not subject one
 who is not concerned in the waste, and who per-
 haps had no property of the testator at any time
 in his hands. What is meant then, that the joint
 liability extend only as far as they have assets.
 What the property meant, not what it was worth
 is the amount of assets.

Note 20th There are two Cases however
 where a man is to be considered as Ex^{or} de son
 tort tho. after probate viz 1st Where a fraud
 is committed

second best gift is made to a person by the testator. this property in the hands of the donee makes him an *ex. de son tort* - as to creditors and they may sue him as such.

2nd But if given after probate like *Ex. de son tort*

Note 21st But an *ex. de son tort* is liable in a distinct character to the right of *ex. de son tort*. When I said before he is described as a common trespasser and stranger not as *ex. de son tort*. - he is liable for the value of the thing taken, and if he had paid the money out he is still liable as a trespasser and he must pay double money for it. Creditors you see have their suit if he has paid out all that was in his hands.

Note 22nd But Judge Keene says he can't see how there is no reason for it - for then there would be two Courts. Contradicting each other. The *Ct. of Equity* merely follows the regard of the *summe of justice* but are not opposed to *Ct. of Law*

Note 23rd Cases of this kind come up before the *Ct.* frequently and they are very difficult to decide. in a great many cases they may appear to have done and yet they have not enough to make a Will and there are sometimes persons who appear almost insane and yet they may make very good Wills.

There was an instance of this kind some years ago. the man was proved

to be considered as a crazy man by all the neighborhood all his common acts appeared like those of a madman. When talking he appeared quite distracted. - yet his Will was perfect - it was in the precise terms he had always said it should be, and was accordingly established. I suppose says Judge there, his Pa & was always concerned about his property, and it never went crooked or wrong as to that. In cases of this kind he thinks the Will ought not to be established. It is want of discretion which renders a Will void, and here in this particular the Statute did not seem to be wanting.

Note 24th An alien enemy or indeed an alien of any kind cannot make a testament of Land altho he has purchased them, for as soon as it is discovered that he has purchased the Land is forfeited.

An Alien friend may dispose of personal property by Will. but it is said an alien enemy cannot - the reason given is that an alien enemy cannot withdraw the property out of the Country. - but Judge Wood says altho, he can find no authorities to support him, yet he cannot see why an alien enemy could not dispose of personal property by Will if he leaves it in, bequeaths it to people in the Country. Neither Alien friends nor enemies can hold Land on the ground of policy.

Note 25th The Law formerly was that a man could not dispose of a Chattel in Trust for his

Self -

Life and remainder over. The reason was that it was considered impossible. an Estate for Life is greater than an Estate for years. It is to be said and greater in this point of view, that it makes him a freeholder. He - but it would be impossible for a man to live 80 years. therefore the reason would fail.

Note 26th That Judge Pease said a considerable question arises here. Why may not the true Construction according to the intention of the Testator, be allowed? - If the words had been "to him and his Children" it would be good. - but here it is "to him and the heirs of his body" - Why may not the next heir take it? - He says it is clear to him that if this was a new question to be determined it would be pushed back it remained over to the heirs. For the intention of the Testator is always to be complied with. if not Contrary to the rules of Law: now it is not Contrary to the rules of Law, for one to take an Estate Tail after the life of another. -

Note 27th - &c, say in England the freehold property descends to the eldest son and the person or property to the other children. The Rule is made thus, it has not the requisites to take real property by, but will convey personal property.

The eldest son is a merchant the Testator's Substantial money would be more acceptable to him than his Land, and he would take all the property.

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versioned property to him, and the Land he de-
vised to the younger Children. Now if the Will is
established according to the rule the eldest takes
all the personal property, the younger Children
take nothing. The intention of the Testator is de-
feated. The eldest son after receiving all the Testa-
tor intended he should have come in under the
Gift of Descents, and (in England) take the Land,
and in this Country would take his distributive
Share of the personal estate. Now this would appear
contrary to the rule laid down "that the intention
of the Testator is always to govern." - if you have
the intention you have the Constitution. -

Note 28th or last Sickness debts to be
this last - seems founded on humanity, the person
for instance is poor. - the Apothecary, or Nurse are
called on. - they will not refuse when they are sure
of their Debts being paid previously to many others,
Nurses are generally poor, they risk their lives almost,
and when they are sure of being paid people lay out
in their last Sickness and will attend. -

Several States in different States in the U.S. it
leave out the word "last" - and say Sickness alone
This brings up the question whether it does not ex-
tend to last Debts, as the judges of the State are -
"Sickness debts" - Judge Reed says he thinks the word
"last" was left out on purpose that these debts
might be preferred. It is a copy of the English
statute -

Stat. and it carries the design farther & say a man should lie sick 6 months, and recover, how all the debts contracted under that sickness want to be paid as sickness debts - but in England the man must die in that sickness or they have no priority.

Note 29th It is said that Record Debts must be paid previous to that of a lower degree, and that the Ex^{or} is bound to know of them and if he pays one of a lower degree altho, he knows not of the record debt he is liable "ad bonis propriis" on a deficiency of assets; the reason given is that he might know by looking at the Records - which he ought to do, - But that is not correct (says Judge Abbot) the Records may be all over the State and he is not bound to search ~~pro recordis~~.

Note 30th But here is enquiry into the Bond. you ask is not this contrary to the rules of Law? No - Enquiry may always be made into the consideration of Bonds when there persons are interested. - The rule of Law is that the parties cannot, but there is no objection against their persons enquiring into it.

Note 31th - Under the Law of England and all the States of the North, the Personal Property is to go to the Ex^{or} or Adm^r - as Trustees; but the real goes to the Heir. - But in this Country when the Personal fund is exhausted, the Rule is

is to be taken. This is more consistent with justice
than the English Law. Again in those States
where this provision is made, if there be any
suspected that the Estate will not pay all the
Average and Debts and all are paid but "paid
passed" no preference being given to any but last
debts. Public Statute Debts and Debts
arising from former exchequer. If there is Es-
tate afterwards found, why they are to be paid out
of it, and then Creditors who have not come in be-
fore may come in and be paid. There is no
priority given to any except property by attach-
ment, which I will hereafter explain.

Remember the average Law, if you break in up
on that you destroy every thing. - Thus can be no
such thing, as an Es^{or} "do do do" where there is
an Average Law, for he is not under the direction
of a Ch of Probate, as other Es^{ors} are, now is he un-
der the direction of a State, as Just^{ice} or a Sup^{rem}
Court had and two persons each has a share for 1000
against the Estate, - there is only enough to pay one,
one sues the Es^{or} "do do do", and recovers the whole
for whatever Credit he has first - tho there be not
enough to pay the others, will recover all his debt
tho the Es^{or} "do do do" is under neither the direction
of a Ch nor of a Stat^{ute}. you ask then what is to be
done? Why the rightful Es^{or} must sue him as
a trespasser, and if he will not, sue him immedi-
ately, and his done & thus the damages will be recovered which
ought to be averaged with the other assets.

Note 32nd Whether one Specified Legatee Can
Compel another to refund in Part if really a *quis-
sitio hereditatis* - For instance Say there are five spe-
cific Legacies given, the first finds he has not en-
ough of assets to pay his share and comes on
some one of these specified Legates and asks his
Legacy Now may he be compelled to refund and in-
deed to believe that the other ought to make it up
is hard, in proportion as it was taken to pay a
just Debt. The authorities are contradictory
they go on this ground to prove that the others
ought not to refund. "That in case this specified Leg-
ate were accidentally lost, the Legatee must bear
that loss, and that he is no worse in this case." But
Say Judge Keene this does not stand to be true then
the principle when it is applied to pay a just
Debt. It is clearly a *quisitio hereditatis* however.

Note 33rd The greater number of au-
thorities say that a Chattel in action not of a
negotiable nature, is not such an one as will
pass by a *donatio causa mortis* - Others say
it may pass, and of the same opinion is Judge
Keene. The reason given why it should not
pass is that the donee cannot remove if the other
refuse to pay, as it is not in his name. He
cannot bring an action. But if the person is wil-
ling to pay, it certainly may be as well as any
negotiable Note. - The only reason why it should
not pass,

No
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just
R.R. no 422
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not pass is - for fear the Dance might be defeated
of his remedy. But Judge Reed thinks that the
Dance not be defeated - that Chy. might pres-
ent the assignment, and ought to direct the Co.
- he being indemnified; let it be said in his name,

th
Note 34. There is no subject of more
importance than to understand the Statute of
Charles. - It is very near the same in all
the States in the U.S.A. it will enable us
not only to understand the distribution of Real
Property of which we are here treat-
ing. but also of Real Property.

There are certain terms made use of in
this Stat. and those copied from it, with re-
gard to those clauses where we use the words of
of the English Stat. which have a definite mean-
ing, we must be governed by the construction
which they have put upon them in this book.

So that the terms "next of kin", and "legal
representatives" - had received a known con-
struction before they were adopted by our Stat-
utes - and we are bound by that construction.

Remember that when the claimants are in
equal degree and take as "next of kin", they
take "per Capita". But when they are not in
equal degree they take "per Stirpes" -

That the mode of computing kindred adopt-
ed in the Acts in England as well as in Chy. is
in.

in the ecclesiastical Gl. and on the Stat^s of
Distributions is the same as adopted in the
Civil Law, and that this mode is correctly sta-
ted in the preceding pages, will clearly appear
from all the authorities. In the "Nesby 334-5".
It is laid down by the Chancellor that the rules
of Computing kindred under the Stat^s are the rules
of the Civil Law, and the preceding mode of Com-
putation, is there stated to be the only correct
method. The Contest in that Case was between the
Grand Daughter of a Sister and the Daughter of an
Aunt both being in the 4th Degree according to the
Computation of the Civil Law, and an equal
distribution was denied.

The same doctrine is recognized in ¹² Rep^{er} 41-
and 2 Vesey 214. Lord St. Leonards, observes the
rule to go by in Computing the degrees of kind-
red of blood must be taken from the Civil Law
see also and on this ground and foundation stand all the
2 Vesey 335 Cases which have come in just since the
12 Rep^{er} 25 Stat^s of Distributions, either at Law or in Ch^{ancery}
2 Atk^{ins} 118. In "Pencourt in Ch^{ancery}" the same doctrine is
expressed - In the mode of Computation is laid down in
Co. Litt^{er} 23rd language that cannot be mistaken. See too
Dowling 78 The same rule is laid down in 2 B. & C. 345-36.

That the distribution is to be made in the
descending line some times "per Capita" and
at other times "per Stirpes" as stated in these
Lectures.

See *See Lovelace on Wills*, where he main-
 tains this as the rule. So too this doctrine is per-
 cognized in the 4th of *Baron's Ecclesiastical Law*.
 (See where Lovelace quotes *Baron* and gives the page)
 and it is nowhere controverted, the rule as there
 laid down is on the supposition, that the intest-
 ates Children are all dead, whether those Children
 were two or three or more each of them having left
 Children as it may be one of them 2 or three 3 or
 more, in this case where there are only Great-
 Children, their Fathers and Mothers had by represen-
 tative died in the life time of the Great Father -
 the Great Children take in their own right, and
 not by representation of their Father or Mother
 deceased, and the Old share distribution is an equi-
 table to wit an equal distribution to
 be made, and thus it would be if there were only
 Great Grand Children of the deceased, to wit his
 Children and Grand Children having died before him,

That *Posthumous Children* take an equal
 share with Brothers and Sisters, see *Wesley 150*,
 where it is declared by the Chancellor, that it
 was settled, that a *Posthumous Child* should
 have a distribution share of the intestate's Estate.

This point was also settled by *Ed Hardwick*
 in the case of *Waller vs. Gibson* in 4th of *Baron's*
Ecclesiastical Law 368, and in *Wesley 118*.

Analogous to this doctrine was the determina-
 ation

determination of the Court in the case of *Mills vs Turner*, in 1 Vesey 85, in that case it was determined that a posthumous child was with in the provision in marriage articles, &c. Such children of the marriage as should be living at the death of the Father or Mother, the Chancellor observes that a posthumous child is considered "in off" in many cases, in all cases relating to his inheritance he must be considered as "in off" according to the Civil Law. So also in the Statute & Distribution he is considered as living.

That when all the claimants are in the same degree they take "per capita", and when some of them are in a promotion degree than others, claiming only as representatives to others, the distinction is "per stirpes" as mentioned in these lectures. See 2 Vesey 215 where the Chancellor says it is now settled that the children of one Brother stand in the place of the parent in sharing with the other Brothers, and take "per stirpes". Yet if no Brother is alive representation in *locus parentis* is at an end, if there be one Brother living and another last left child and however many they take but a moiety with the Brothers. But if that Brother is dead, all in the same kind of equality, take "per capita". So it was determined in *Poe* in

Dec. in Chy. 54th where I had 3 brothers who
 were dead. at the time of his death, one left 2
 children, one left 3 and the other 4 children,
 that the distribution of his Estate among his
 nephews and nieces should not be "per Stirpes"
 but "per Capita" and that they should all
 have equal shares, without any regard to
 what their parents would have taken, so they
 did not take by representation, but all as
 "next of kin," in equal degree. In B. R. W. 56th
 the question was whether the personal Estate
 of S. Dore should be distributed "per Capita"
 or "per Stirpes" - he left only 2 nephews & nieces,
 one nephew by his Brother, and 3 nephews and 2
 nieces by his Sister. The Chancellor decreed that
 all the nephews and nieces should take equal
 shares "per Capita", and not "per Stirpes".

In Lord Willoughby's Case, the Chancellor
 said if an intestate die leaving a deceased
 Brother Child and 10 Children of a deceased Sister,
 the 10 Children of the deceased Sister, shall take their
 parts out of stock with the Son of the deceased
 Brother, because they all take "per Capita" and
 not by way of representation. The same doctrine
 is laid down in, 1. Atk. 455.

That representation among lineals continues "ad infinitum" *per R. W. 57th*

That representation in the collateral line
 can't extend beyond Brothers, and Sisters Children.
 As to in their grand Children, to take as long as
 any

That all who are in the same degree of kindred take equal Shares where there is no right of representation. See 2 Vesey 213. where the Aunt was admitted to take equally with a Nephew, and where the intestate leaving no Brothers and Sisters only such Children who could not take by representation; for the Aunt Nephew and Niece were all in the same degree of kindred to the intestate. Viz in the third. See this and confirm in the Tenth 454. So where the only relatives of the intestate were were the Grand Nephew of a Sister and the Daughter of an Aunt, they shared his Estate equally, being both in the fourth degree of kindred to the intestate.

That a strict adherence has been observed by the English Cts. of distributing to the 'next of kin' according to the computation of kindred by the Civil Law is evident by the following Authorities. See Chy. 5 D. where the Grand Mother, being in the second degree was preferred to the Aunt who was in the third degree. The same point was adjudged in 1 Salts 251. and 10 W 41.

The Great Grand Mother takes equally with the Aunt they being both in the third degree 2 Vesey 213.

I know of no departure from this rule or principle except in the case alluded to in these Lectures. of preferring Brothers and Sisters to the Grand Parents when they are both in the second degree.

That relations of the half-blood, taken equally with those of the whole blood the 7th or some Estate of the intestate. See Vernon 437. where the Chancellor observes that before the Case of Smith, and Tracy, determined in the 28th of Charles 2^d (which was six years after making the Stat^o of distributions) the King gave but a half share to the half blood, (and was in Virginia a Law of the State of the 40th when that year but a half share to the half blood) - yet since that Case the matter was settled that they should have an equal share with the whole blood. In Vernon 403. it seems to have been the opinion of the Ct. that the half blood should have only a half share, but this is not now Law, for since that time it has been settled in the House of Lords upon an appeal that the half blood should have a whole share equal with those of the whole blood, reported in Vernon 134. The same doctrine is to be found in 1 S. R. 230 & 3. and since, the above Case in Vernon, has never been doubted.

That the distribution should be the death of the intestate settled "intestate" in the person who had a right to it. See Bellknap 118. where it is apparent that the Chancellor considered a Child "in ventre sa mere" as a person "in p^{re}" - and from the Estate man sett^d that opinion is confirmed by the opinions of Tracy and P. so in 1 Salk 220, who held that a Child not such Child was good. And in 1 Salk 220 may be seen in favour of such Child as they write, see Vernon 710.

There appears to be a distinction made in the Civil Law between a child "in ventre sa mere" "in utero" and one that is only conceived who is said to be "non animatus". This distinction I believe has never been admitted in the English Courts it is certainly a very nice distinction, and I believe no Philosopher can satisfactorily settle the point that such child is non animatus. Such child stands in need of a provision arising from a distributary share, as much as any other posthumous child.

In B. P. W. v. W. & L. D. we find it laid down that where a person entitled to a distributary share under the Stat. dies before distribution, which Court he needs not a year has elapsed, after the death of the intestate, yet his share is a vested interest and transmissible to his Ex^{ors} or Adm^{rs}. So too when A the son dies leaving B the father, who was entitled to his Estate and B died before distribution A's Estate did not go to his next of kin, but to the next of kin of B in whom the Estate was vested before distribution.

That in the ascending and collateral line all who are next of kin whether on the side of the Father or Mother are entitled to an equal share, see P. W. v. B. where the claimants were a Grand-Father, on the Father's side and a Grand-Mother on the Mother's side. No preference is given to Males over Females nor is any greater interest shown to relations on the side of the Father than on the side of the Mother.

That I received to the Stat^o of Jarnot where
the Father was dead and the Mother living she
would take the whole Estate being the only
person who was in the first degree - see 4 Burn
Ecclesiastical Law 349 and Lovelass on Wills 78

It is true that when the Father is living the
Mother takes nothing, even if the Father should
die before he had provided the distributary share
if in Choses to possession, but they would go to his
Estate. This casts light upon a question in some
measures disputable. Whether Choses that accrued
to the Wife during coverture and survived to her
had when her husband had not provided them to
possession? Since a distributary share under
the Stat^o could not survive to her by parity of
reasons no other Choses (as a Reversion for instance)
which accrued during coverture and survived to
her at the death of her husband.

That I send the Stat^o of Jarnot 2^d the Mother
does not take in exclusion of Brothers and Sisters
and their legal representatives but takes an equal
share with them, as a Brother and Sister are bound
to rear up the children of their Mother and Sister
to the second degree to take by representation.
On the other hand the case of Stanley vs Stanley
to examine whether decisions where all the Brothers
and Sisters were dead leaving children, and the
children being in the same degree with them claimed
where that were excluded, for in this case the

Mother

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Mother was living who was constituted part of the
old stock, as much as if she had been a brother or
sister. - if the mother had been dead the nephew and
aunt must have shared with the Nephews and
Nieces for so and also the cases. "2d P. 314" -
"telling 458" (2d Vesey 214)

The Stat 29th Charles 2^d altered the situation
of a wife's Estate, for by it Choses in action
which are not reduced into possession remain hers.
- the Husband must be appointed Admin. and to
the extent of assets he must pay Debts like
any other Admin. as Husband, and he is to
take any just claim. The reason of it was this,
under the Stat 31 of Edward 3 the nearest and most
lawful friend was to be appointed, and then he came
in. then the Stat of Henry 8th said to the Widow
or next of kin, she practised still continued of
granting Admin. to him. - then under the Stat 22
of Charles he must distribute to the "next of kin"
but he is not "next of kin" - then the Stat 29 of
Charles altered this and said the Husband should
enjoy the Estate. Suppose Admin. is not granted to
the Husband but to another still the Estate is his,
for the Stat vests him with it. And in all
the Statutes there is a Stat 29 of Charles, the
Husband is entitled to the Estate. Where there is
no Stat 29th Charles but one of the 22 of Charles
he must distribute to the "next of kin" he not being
next of kin. His married rights are not affected.

40C 1 page 707.
40C 2 page 94.
C.D. 103.

Vol. 1 page 75
2d 504
Brooke 100
1st P. 381
3d P. 520

Note 35th If a Child in the life time of the Father had received more than a distributary share of the Estate, he may retain it, he is not obliged to deliver it up. Remember no other gift than by the Father is considered an advancement. So if an uncle had given a Child ever so much it would not hinder his taking a distributary share of his Father's property. It is no advancement.

Note 36th To settle Deeds or Money to set a Child up in life are to be considered as advancements and if the Deed had said in the body of it "for value received" if it can be proved that no value was received, it is an advancement. In short any thing to set a man up in life is an advancement.

3d. An. 317. A small trifling sum of money now, and little present, which a parent may give his Child are to be considered as advancements. Such as *2d. 638.* spending money, a Watch or a Horse but it must be something toward setting him up in life. — *Q. 141* In England giving a Child a liberal Education is not considered as an advancement. But in Conn. properly expended in the education of a Child is an advancement. So in England when a sum is given with an intention it is not considered as an advancement.

3d. An. 356. There is a singular exception to the Law of advancements in England viz that an advancement by the Mother of one of her Children shall not bar his taking an equal share with the others under the distribution. Therefore whatever a Child gets from any other person than the Father is no advancement. — Take this as the rule. —

Note 37th He is not liable for any loss which may come to the effects provided he use ordinary care in their preservation and keeping. So we are to do our best there must be some willful or negligent misconduct. An Ex or Adm is not answerable for any misjudgment, as in the case of the Cargo of Cotton, reported in the Books. -

While Warrantes were recoverable at Law in England, if an Ex released the obligor or received the principal and interest of a Bond which was forfeited without receiving the penalty he was liable in times of technical means. He was guilty of a devastavit. But Chy interposed and championed down that penalty they said he had no right to the penalty, and almost all the States have done the same.

So submitting to interment amounts to a devastavit if the award is not just. But Judge Reeve questioned whether a rule so rigid as that would now be enforced.

Ex Chy 48

2 Dovers 41

How Ex tho, could sue for a Debt which has already been paid it is a devastavit. How Ex, in selling the goods of his testator & affixing a loss tho, want of that care and diligence which an ordinarily careful man would use he is liable for a devastavit.

The payment of an, unusual tax has been considered a devastavit tho, Judge Reeve thought it - would not be so considered where the principal and legal interests only were paid.

Ex parte 157

Ord. 105-0

Myers 129

2 B. & C. 431.

Ex or Adm

How Ex^{or} pay a Debt-banded by the Stat^{of} 18th 525
 Semitators. It is a question whether it would be
 a devassavit, if it were a just Debt-Judge Peere
 thinks it would not be so Considered.

A Devassavit is always Considered as wrong
 & ^{some} against the Stat^{of} is a warrant only as
 far as it goes. if he has paid out all he may plead
 "Plene Administravit" When Goods are lost - not by
 the Ex^{or}'s fault - he may be a Suit by a Creditor Plea
 "Plene Administravit" and give the loss in and end

As to the remedy the modes in the different
 States in the 20th. are not alike Some of them are
 according to the English mode. Suppose A sues
 B as Ex^{or} of C and he pleads "Plene Administravit"
 and sues in that Plea is he shows he has paid
 out all the effects he has. notwithstanding A sues
 out as Judge agtst B. but he can never get a "Scire
 Facias" or "Bonis Provisis" but there is a Judge and
 it may be satisfied if properly a Plea comes in,
 - the Judge is not rendered agtst B. but agtst
 the Estate of C in the hands of the Ex^{or} B.

But how are we to know when there is a de-
 vastavit? Why you take an Ex^{or} and give it to
 the Sheriff. he goes, and returns "Nulla bona" and
 that there is a devastavit, this is one way. But
 are you to take his word that there is a devastavit? No
 - on this return a "Scire Facias" issues suggesting the
 devastavit, the Ex^{or} then comes in and may prove
 that.

Ex^{or} 525
 Ex^{or} 525

that there is no devastavit. if he fails to prove this. R. 210.
 then I say you say, then "de bonis propriis," but if he S. Coke 32
 succeeds there is an end to the suit, another mode
 is, the Sheriff does not return a devastavit - but -
 merely a "nulla bona" - then you suggest on the
 record of the C. P. that there was a devastavit after
 that a writ of enquiry goes out. the Sheriff summons
 a Jury to enquire into it, and if they return "he was
 one then a "Scire Facias" may be issued, all one
 as tho' the Sheriff had returned a devastavit, the Ex.
 may traverse that or not as in the former case.

Judge Reeve says he saw this mode in some
 of the Reports of the neighbouring States "Bring a
 suit against the Ex.^o, when he pleads "plead dominion
 admit it, and then reply devastavit again" - this seems
 a reasonable one, and he does not see why it might
 not be as well tried this way as in the other modes
 above mentioned, the Jury then would be "devastavit
 or not" - this is certainly much easier than the Eng-
 lish mode.

Difference of the Law of Conn.^d from the English Law.

The Law of several of the States, is nearly the same
 as that of Conn.^d Judge Reeve remarks

By the English Law the personal property is the
 only fund out of which Debts can be paid, except
 Record and specially Ch. 461. In Conn.^d not only
 the Personal but also the Real property of the Deb-
 is

is funds in the hands of the B^d for the payment of
Debt. but the Personal is first subjected and then
the real by order of the C^o of Probate

In the English Law some Debts are preferred
to others. So what we deficiency of assets. Some par-
ticular Debts will go wholly unpaid. But in
in Court no preference is given. Debtors have no pri-
ority, except debts due to the Public and certain protectors.
As well as funeral charges, there must be paid tho' there
be nothing left to pay the other Debts. all other Debts
are paid ^{pro rata} "pro rata". on a deficiency all the Debts
being averaged proportionably among the Creditors of
all ranks.

When the Ee is apprehensive the

all ranks. When the Ex^r is apprehensive the Estate is insolvent, he must apply to the Ct. of Probate who will appoint a Committee, i. e. authorize three judicious persons to appraise all the real property of which it is the Ex^r's duty to make an inventory, and also to adjust all his accounts, allow such Debts as are just and legal, and reject all others, which they have full authority to do. And if on the appraisal of the property, and the adjusting of the accounts, the Estate proves insolvent the Ex^r may take the property at the appraisal, and the Ct. of Probate having attached the average pay it out of his own pocket, or he may sell the property and the avails then the more than the appraisal shall be appropriated to the payment of the Debts, and if there be a residuum, it shall be exhausted in paying Legacies or distributed according to the Statute. — If the

If the sale of the property does not amount to the ap-
 praised the average must be proportionally reduced,
 New Estate being discovered, after the average is struck
 the Ct. must go forward to the Ct. of Probate, and get
 an order for a new appraisal of the Estate, which he
 must inventory, and the proceedings are the same
 as before. The Estate discovered must be averaged. — if
 it proves still insolvent, if not the Debts must all be
 paid, and the residue disposed according to the will
 of the decd, or as the Law directs. This mode of
 appointing Commissioners, and averaging is very
 equitable in every respect except that these Commis-
 sioners have exorbitant powers. there can be no appeal
 to be said they have a right to be so, but they may
 be mistaken. The Ct. may reject the return they
 make and appoint new Commissioners, but it is
 not done very frequently. The allowance of the Com-
 missioners is paid at A respects Creditors. but not so
 as it respects E^x or Est or Eth. for they to a Suit upon the
 Debt so allowed may make any defence that might
 have been made by the Testator or intestate. and
 they may appeal to the Superior Ct. and they decide
 the points if differently from the Commissioners. there
 must be a new average.

In England if the E^x have fully paid, and
 is sued the plea is "plea administravit". But in N^o
 need not, and E^x. can never plead "plea administra-
 vit" to a Creditor. but he must plead specially that
 according to the average of the Probate he is to pay but
 5/-

5/10 of the pound, or whatever else the average may be
except where the State Budget is exhausted in pay-
ment of General Charges, Public or Sinking Debt.

In England there is no limitation as to the time Debts must be paid in. In Conn. there is a time set by the Ct of Probate for all Crs. to bring in their accounts, or else to be barred of their debts, and average then can only be made among those who have come in. Now new Estate being discovered afterwards those Crs. who did not before come in, now may, and have their Debts paid up to that average which had been paid the Creditors who came in for the former average, if there be sufficient estate discovered, the remainder shall be averaged among these and the former Creditors, and if there now prove to be a residuum it shall be distributed & disposed of as the Court directs. But if any of these after Creditors, or any of the Creditors have been at any expense in discovering that Estate, their expenses shall first be paid to them.

In England the Ex^{or} gives no Bond, but
 the Court he does, and the same manner that an
 Att^y does, and if he neglects to indenture an Ex^{or} he
 is liable on his Bond. If an Ex^{or} refuse to pay or
 administer on this new discovered Estate a Suit
 must be bro^{gt} on his Bond given for a faithful dis-
 charge of his trust, and in the name of the Judge of
 Probate, all the new discovered prospects will be discovered
 out of the Ex^{or} pockets, and the Judge of Probate will

hold it as trustee for the Creditors, &c. So if the Ex^{or} will not execute upon the now discovered Estate, or the Adm^r will not administer he may be displaced and an Adm^r de bonis non appointed to administer upon it

In Court a Defendant can never be displaced as to Creditors. It might be placed by Decretes and so might "plene administrant". But Creditors cannot sue average Law is such, the defendant is always covered in the Bond. The Suit is to be on the Bond, and Judge goes against him. Remember that the one who sues is allowed his reasonable expenses of carrying through the Suit in the first instance.

For the same reason that Court the an Ex^{or} "do not test" since the Estate is insolvent (this is a gen^l rule whenever there is an average Law) he must be sued by the rightful Ex^{or}, or Adm^r as a Trespasser and the same damages will be thus recovered on the judgment obtained against him which ought to be averaged with the other losses. If there were an Ex^{or} it is over wrong, one Ex^{or} might sue and recover his whole Debt.

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It difficultly has arisen in Court (and the same will happen) whenever there is an average Law, with respect to what must be done with a Voluntary Bond. - the nature of it is that it is not a Debt as to Creditors, but it is to be paid as to all other Debitors. Not out a Case, the Estate is represented insolvent: upon examination it is found that without the Bond the Estate would be solvent. But by its

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Admof-

admission the Estate would be rendered insolvent -
 therefore agreeably to the rule that Creditors must
 be preferred to Voluntary (for the Obligor of such Bond
 is considered a Voluntary) the Commissioners reject the
 Bond, and on such rejection the Estate not only pays
 the Debt, but there is still a Surplus say £ 50. The
 Bond is for £ 100 Now agreeably to the rule that the
 holder of a Voluntary Bond shall be preferred to all other
 Voluntary the Obligor of the Bond ought to come in
 and take the 50 £ in preference to any other Legatee
 or next of kin; but a rejection of a Debt by the Com-
 missioners totally destroys it. So that the Debtor can
 have no demand in future on any one. You see
 then that by striking him off, he is cut out from the
 fund upon to which it goes all thus he is best entitled
 if he is not struck off. Creditors lose their Debts in part.

Therefore it seems that the Ex^r can proceed neither
 way without transgressing some one principle. I said
 however the difficulty may be evaded Judge Reeve
 thinks by the Commissioners in such cases taking an
 account of the Bond and carrying it into the Court
 of Probate to stand as a Legacy of the first grant and
 be first entitled to payment as a Surplus.

Miscellaneous Articles

Where money is voluntarily paid into an Ex^r's hands
 he is not liable to interest except in case of misap-
 plication. But if he put it out to interest he is then
 liable thereof; and if the money interest he has used

used ordinary prudence he is not liable for such loss.

His Chy. commands him to put out the money to interest he must. But if he contracted a safe and creditable Debt to pay in a debt he is then liable to interest. Whether he put the money out to interest or not for thus Contracting payment of a safe debt can be reconciled in the other hypothesis that that he meant to profit himself thereby.

It is a principle of Law that a person can gain to himself by legal diligence, a lien upon property as a security. If his Debt that lien shall not be to the person found him in favour of any other Creditor, and therefore when one has secured his Debt by a Mortgage it shall not be subject to the average Law. And on the same ground it would seem that where a Creditor has gained a lien upon property by way of Ex. his debt should not be subject to the average Law. - though the Gen. opinion is contrary to this, "Quod" would not the case be the same where property had been levied upon to respond the judgment?

On the death of one of two Merchants who jointly of the Co. property, now in the debt, Ex. but who the right of property so vests the right of suing therefore, in the negative right of being sued for the Companies debts does not cut it. Surveys in the joint ownership. But tho' the Ex. has that the right of litigation he has full power to receive a voluntary payment and release a debt and on the

Survivors

Survived being sued and moving a Bankrupt the
 Ex^r becomes liable to an action for the Company's
 Debts: for both parties are liable for the Debts of
 the Company. But in such case the creditors
 mode of proceeding has been in England by filing a
 Bill in Ch^y. and such has been the mode in Conn^t
 tho' the Sup^r Ct. have now determined a C. & E. action
 will be good. If both the parties should happen
 to die, as instantly, the Lord Chief Justice are at
 a stand, yet Judge Wood thinks the Ex^r of either might
 be sued on the presumption that his Testator was
 the Survivor and that such a presumption ought
 not to be contradicted. A Judge being had by the
 surviving partner and Ex^r, issued the question is
 whether or his death the Ex^r of the first deceased
 partner can compel the Debtor to make payment
 to him or no person being appointed to represent the
 last deceased partner with power to do so.

2207

Contracts

2367

Conclusion

Contracts

by Hon^{ble} P. H. and J. Gould Esq.

1st Of Contracts that may be avoided, because of defect or want of understanding in either of the parties contracting; and under this class will be included Idiots, Insane Persons, Persons of nonsane memory; Minors, and persons wanting a sufficient degree of understanding, from any other cause,

2^d For want of sufficient persons of full age at the time of making the Contract to consent thereto. Under this class will be included Femes-Covert, Persons under duress, and Persons under an undue degree of influence or fear tho' not amounting to duress.

3^d From the intervention of error or mistake, without which the Contract would not have been made. This class of Contracts is based upon extrinsic causes, not upon any defect in the Contract, or inability in the contracting parties. The void or voidable quality of the Contract in the two former classes, arises from the incapacity of one or both parties to contract.

4th From the idleness or uselessness of the Contract, or from physical or moral impossibility to perform it. The inclusivity of this class is.

it is introduced, arising from the Contracting parties.

5th From the Contracts being obtained by the tortious act of one of the Contracting parties, as by fraud, by duress, or by taking undue advantage of the situation and circumstances of the other party.

6th From the defect of not being in writing, a Set of Contracts is invalid.

Some of the foregoing Contracts are set aside in Courts of Law and others in Cts. of Equity.

Under this title will be considered the power of Courts of Law to set aside Contracts, and the power of Cts. of Equity to compel a specific performance; which Cts. of Law never do, they giving only, damages for a breach thereof.

An assent it is said is essential to the Constitution of a valid Contract. This is true always, but true when the Contract is "express."

But there are many cases where the Law enforces an implied Contract, which do not go on the ground of assent, but of duty, and in such cases it would be absurd to suppose an assent. As where a husband turns his wife out of doors, and publicly declares he will pay no debts of her Contracting. Yet on the ground of duty, & duty not of assent, she is liable on her Contracts for her necessities. Duty, not assent is the governing principle in implied Contracts.

That is.

The it is said *lts of Law* and *lts of Equity* are gov-
 erned by the same principles; yet the ^{Principles} *portions* are very
 doubtful. But however that may be this is certain
 that *lts of Equity* carry those principles much farther
 than *lts of Law* and suffered many cases to come
 within the reason of the principles to which *lts*
of Law would not extend. *S. & C. lts of Law* will
 set aside Contracts obtained by *duress* on the ground
 that the person operated upon by *duress* has not
 sufficient freedom of Will. to act with discretion and
 consenting to the contract. So Contracts may on
 the same principle be set aside when obtained by
 any undue degree of influence or fear. though not
 amounting to *duress*. but here by *lts of Equity* only
lts of Law will not extend the principle to these cases.

Contracts obtained by *duress* are set aside,
 not only from the incapacity of the person, under
duress, to consent thereto, but also from a principle
 of policy, that no one should take advantage of
 his own wrong. And this rule of policy is held
 with but one set of exceptions. "Yes" where one pe-
 cuniates his property by a breach of the peace; for
 in such cases the person from whom the property
 is taken, has no proof to substantiate a recovery.

A Contract may be set aside by a plea
 of "Infirmity" as by a plea of Infancy, for the
 Def. must show not only that he was imbecile-
 ted, but also that he was imposed upon, and that an
 undue advantage was taken of his situation.

When

When a bargain would not have been made, but for the intervention of some error or mistake it may be set aside, for the minds of the parties met on the mistake alone. Which was the *"sine qua non"* of the Contract. But where the mistake was not the sole cause of the Contract, tho it may have contributed, the Contract will not be set aside, but adequate damages may be recovered.

Contracts will not be enforced - "void Contracts" because it is beneath their dignity to consider so noted men besides they had a sufficiency of more important affairs to attend to.

Contracts to be set aside on account of their physical impossibility, must be such as are impossible in the nature of things, not impossible to the party contracting only. For if Contracts are impossible only to the party contracting, the Court will give damages for the non-performance and if the impossibility arises from the act of the party the Court of Equity will decree a specific performance and inflict suitable penalties for non performance.

Contracts that may be set aside for their moral impossibility are also such as are contrary to Law or "Contra moribus." No such Contracts are set aside on a principle of policy, without regarding either justice or honesty between the parties, and whatever shake such Contracts may assume they may be avoided. And proof may be admitted -

admitted to show that the Consideration of a Sealed Contract was immovable. If money be paid on this in Consideration that he do an unlawful or immoral act, and he neglects to do it, yet on a principle of Policy, that money is not suffered to be recovered; for when the law of Recovery would operate as a stimulus to or the act, also a recovery is not suffered on the ground that the Law will not lend its assistance to persons attempting a breach of Law, or a trespass on morality.

Contracts procured by fraud are sometimes set aside in Cts of Law, sometimes in Cts of Equity, sometimes partially, and sometimes wholly. Cts of Law, set aside Contracts not for fraud in the Consideration but for fraud in the execution. Cts of Equity, rescind agt. Contracts, when fraud is found in the Consideration. Yet this distinction is of late not so distinctly adhered to, and in Court may be considered as gone away.

Some Contracts tho' strongly infected with fraud, are not entirely fraudulent.

These are not wholly rescinded, but the price of the thing, and where the fraud is practised is in damages.

Tho' Cts. when it will not affect third persons, will adjudge a Set-off, as where an unsound Horse was sold for a sound one for which a Promissory Note was given. Cts. will order the Note to be given up, if it remains still in the Obligor's hands; and the horse to be returned. The principle on which these Contracts are rescinded, either in whole or in part is that

"no one shall be suffered to benefit himself by his own tort," - which would be a good policy.

Contracts procured by taking an undue advantage of the situation and circumstances of one of the parties, are not relieved against in Cts of Law, but of Equity only, and then Cts relieve against such Contracts especially where the party was enticed and drawn into the embroilment by the other party.

Those Contracts which may be set aside because not in writing, are thus voidable by the provision of the Statute, which was grounded on convenience or policy. - Cts of Equity where they rescind Contracts totally, or partially rescind them on the terms that the party in whose favour they are avoided, do also be in conscience ought, pay, or be in conscience owed, without regarding the honesty or dishonesty of the other party. For then Cts are not vindictive like Cts of Law.

A principal difference between Cts of Law and Cts of Equity is - that where there is no legal remedy, to compel a person to do a certain act which he in conscience ought, as to convey lands or the like, Cts will consider him a trustee, and compel execution of the trust or act, under proper penalties. - It is a general rule that "Cts will not compel a specific performance of Contracts unless Cts of Law would have adjudged damages for a breach thereof." But to this rule there are exceptions, for tho' a Cts of Law would give damages, they will not in certain cases

and a specific performance. So on the other hand
sometimes tho' a Ct of Law would give ^{no} damages yet
it will order a specific performance of the Contract.

Of Contracts that may be avoided.

I First Because of a want of understanding
in either of the Contracting parties.

under this division fall the Contracts of Idiots.
Insane persons. Persons of non sane memory.
Lunatics. Persons intoxicated. Persons of a weak
understanding from a series of intoxication. From
Sickness. From old age, or from any other cause
and of Minors. The Contracts of all these
Persons except minors, are avoided on the ground of
a real want of understanding. Those of minors on
the ground of a legal interdiction, that the Infant has
not a sufficient discretion tho' in point of fact he
may be equally discreet with the wisest adult.
Therefore all these persons are either really or legally in-
capable of effecting a Contract.

It has been observed that an assent is not necessary
to an implied Contract raised by Law. And also
observed that this proposition is not true viz that
an Estate voluntarily given does not vest but by the
assent of the Donor. - The fact is such estate does vest
without any assent, but is liable to be divested, by a
subsequent assent.

It is laid down that the Contracts of Idiots, Insane
persons. Persons of non sane memory, and also those of
Lunatics,

4 Co Rep 126
2 B. & C. 728
3 B. & C. 290
Q. B. 301
3 B. & C. 315
3 B. & C. 388
1 Kent 198
1 B. & C. 113
2 B. & C. 291

Page 13-14
Co Litt. 2
2 Kent 203

Lunatics made in a *Pl of Equity* are strictly void. So
 23 Bous. 292 are the ancient authorities, and the rule holds true with
 31. regard to the heirs or representatives of such persons, who
 may, by a Plea of insanity, avoid in a *Pl of Law*
 their Contracts. But a most absurd rule has
 5th Edw 3^d a judicial establishment in England which is "that
 21st Geo. 4th 406 the party himself cannot avoid his Contracts, on a
 600 Eliz. 398 Court of insanity the reason of which is "that no
 112-52 man shall be allowed to murther himself!! -
 4 Coke 123,

But it however a sign a different reason for
 14-23 that to allow a person to plead his own insanity
 would be very dangerous as it would give room to
 dissembling, to fraud, and collusion &c. therefore on a
 principle of policy it is not suffered - This if it
 be a reason is wholly done away by *Ch's* suffering
 in the life time of the party - a Plea of insanity
 by the attorney Gen. to avoid the Contract, for *Ch's*
 of Equity are as liable to be worked upon by fraud
 and collusion as *Ch's* of Law. Anciently the method
 by which those persons might have their Con-
 tracts avoided was as follows - On its being suggest-
 ed to the Chancellor that a person was insane, a
 writ "de idiotis inquirendo" was issued agt him
 to bring him into a *Ch of Equity* where the mat-
 ter was determined. If he proved to be and to be or
 4 Coke 126 insane, the Chancellor appointed a Conservator and
 10th Ch 112 a "Bene Facias" was issued calling in all persons
 having any claim agt him on the score of his
 Contracts, and those Contracts are then declared void,
 pro-

provided they were not before voluntarily given up,
When the Lunatic does not himself testify, but others
do it for him, and so the maxim is preserved.

The modern proceedings where one would avoid
a Contract of that kind are thus. The Attorney Gen.
files a Bill in Ch. and it being found in a Ch. of
Inquiry that the person is an idiot or insane, Ch.
will then set aside that and all his other Contracts to
be void. Thus many the Contracts of Idiot, Insane &c
seem to be avoided in England in Ch., not by their
own plea but by that of the Atty. Gen. who it has
been determined that where the person joined with
the Atty. Gen. in the Bill it was still valid.

You see then and a course of decisions that es-
tablish these two points. It certainly was not al-
ways the Law in England. Fitzherbert mentions a
case that was given to a Lunatic, after he acquired
his Senses. He set aside Contracts made by him,
owing his incapacity. "Blackstone" also ridicules
the rule as whimsical.

This question has been determined in the Sup.
Ch. in Conn. his own plea was "non est factum"
and as it the Ch. decided his plea was good. There
was no precedent in our Ch. previously. But here
he was permitted to testify himself.

There is a case where it has been decided in Eng-
land in a Ch. of Justice. Where the conveyance has
been by deed and the Ch. would take care of them,
yet there are cases where the Ch. would not grant
relief.

3 Atk. 170.
3 B. & P. 105 = 11
2 D. 118
2 N. & W. 130
Q. 114
16 G. 2 279
10 G. 2 112
Fitz. N. B. 466.
Sutton's Report,
2 B. & W. 118.

2 B. & W. 274

2 Stry. 1104.
4 Co. Rep. 134
1 B. & P. 134
2 N. & W. 412
Q. 1078
It is.

It is a question whether a Lunatic could be obliged
 18 May 82 to execute a Contract he had entered into before he
 9 May 1815 became a Lunatic, which he would have had to ex-
 ecute in Chy? In this case Lord Hardwicke decided
 that he must perform. Some say the argu-
 Question: ment in this case goes too far, on the other hand a
 man might get rid of all he owed. I consider it
 as a question that will be set up, it is now doubt-
 ed, tho' since the time of Edward 6th it has remain-
 ed untouched till lately.

It has been a generally received opinion that no
 30 Dec 1831 person shall avail himself of drunkenness as an
 18 May 19 excuse for any act, and that on a sound principle
 10 Oct 20 of propriety. And from this principle the Law
 has never gone aside. But Chy. has decided
 that when a person is drawn into a fit of in-
 this & subject noculation, by the contrivance of another and then
 a bargain is made out of him, that these Con-
 tracts shall be relieved agt. But Judge Reeves
 says he can find no authorities where Chy. has gone
 further, tho' the Ct. have not decided that they would
 not go further, and it seems on principle that
 Chy. might relieve agt. Contracts obtained of a

Continued
 30 Dec 1831 drunken person merely from their in a quaggy on
 10 Dec 30 the ground that Contracts obtained by taking an
 undue advantage of ones situation or circumstances
 are to be relieved agt. And in Conn. such a
 contract has been relieved agt. on this principle tho'
 there was a suspicion that the person who obtained
 the,

the Contract drew the other into his intoxication, —
On this ground the Ct no doubt determined, and there
they had authorities directing the Contract to be re-
lieved agt. Drunkenness abstractly considered is
no ground on which to set aside these Contracts even
tho the party was drawn into his drunkenness. The
unreasonableness or inequality of the Contract must
concur with drunkenness that it may be relieved agt.

If a person when drunk commit a crime
drunkenness will not excuse him. It has been
said also that tho a person be deranged from con-
tinued drunkenness for years, that this derangement
does not excuse him; but this is not true. Such a
derangement may excuse him.

Of the Contracts of Persons of weak Understandings.

At C L no intermediate class of persons is
known, they are all either wise men or fools.

And they seem very shy of acknowledging a class
between these two, and therefore when they have pre-
sented or relieved agt Contracts obtained of persons of
a weak understanding they say it is on the ground
of fraud, it being fraudulent to take advantage of
one's weak understanding. This may be, but for the ^{Reason 30,}
weakness of understanding, they would have been no ^{10th 50}
bound, and the same Contract would have been valid ^{Do 63-5}
if obtained of a person of sound mind. The weakness
of understanding, is in fact the "sine qua non" of the ^{3d 1209}
relief. Therefore it is not true that Cts of Equity will
no more relieve agt such Contracts than Cts of Law.

sgw

Power 31
23d 228.

You will observe that Ch of Law do not relieve in these Cases Chy alone relieves. But there can be no definite rule laid down, the relief is granted according to the circumstances of each ^{case} that comes before them. Some may be weak and liable to imposition, &c. A nobleman had a son of inferior understanding - not an idiot, he appeared to be quite a gentleman. He is father engaged his family, Father to go the tour of Europe with this son, and to pay him liberally, and while on the tour the father obtained of the son a bond for £1000, before it was paid the young man died. Altho' there was no objection as to Creditors, Chy decreed agt it. I suppose from the circumstances that he has taken advantage of his weak ness, and situation.

There are Cases where a man has been in paralytic state, and has been imposed upon, where Chy has set aside the Contract. 2 Atk 334 But remember there must be a want of Consideration in all these Cases or bargains which Chy will set aside. There is also a Case where relief was granted because Chy supposed the man so debilitated with age that he could not make a good gain. See the Case of a man "in extremis" where the Contract was set aside. 2 Power 144.

The Court may avoid the Contracts of Idiots and insane persons &c. in a Ct of Law but for drunkenness, or weakness of understanding, the relief must be in Chy alone.

The

The Contracts of Minors.

This has been fully treated of under the title of Parent and Child, but we will lay down some of the great and important rules here.

The proposition is generally true, "that the Contracts of Minors are either void or voidable" And all their contracts are either strictly void, or may be avoided by a course of pleadings in a Ct of Law. (Judge Reece is of opinion that Minors Contracts are void *in toto* strictly void unless they elect to make them so.) (as we saw of this hereafter) Except their contracts for necessaries by which they are bound provided the articles purchased were necessary at the time of purchase and were suitable for them (i.e. suitable to their degree), they having neither Parents Masters nor Guardians; or having them but being out of the reach of their protection and government or (the Law in its humanity says) being within their reach if the one is not duly administered or the other duly exercised (in which last case they are in a worse situation than if they had no Parents like.) all these circumstances concerning them, and bound for their Necessaries, according to their value, not according to their contracts for them if they contracted to pay more than their value.

At the same time that a Minors Contract made when from home he binds him the Parent he is also liable on the Minors Contracts.

From the foregoing rules notwithstanding the proposition that Minors are bound by their Contracts for

And since the Conclusion may be drawn that infants are not bound by their Contracts for necessaries. But by an implied assumpsit raised by Law and founded on duty according to their quantum or value.

But to proceed on the ground that they are bound by their Contracts for necessaries not only all the foregoing incidents must concur but the instrument of Contract must be such that the Consideration may be enquired into or else it is strictly void. For an Infant's Privileges could not be pursued if he might bind himself by a Contract, the Consideration of which could not be scanned, he then might be bound for other articles than necessaries.

But that an Infant's Contract for necessaries is void, if it be such that the Consideration can't be enquired into, is no hardship on the Vendor of those necessaries for the Contract being strictly void there is no merger of the original Simple Contract but the Debt attaches to that and the Infant is liable on an assumpsit or "quantum valent" &c. If the Infant gives a Bond, now that is utterly void the Consideration cannot be enquired into. At the Suit may be brought on the implied assumpsit.

The Books say that a Bond would subject him to a Penalty; but that is not the case, as the Penalty would be Channcied soon the Consideration cannot be enquired into, this must be the true reason. On any other Security that is given where the Consideration can be enquired into, you recover or nothing more than the article actually worth.

Edw

But when you sue on a bond, you must recover all or none. But to the rule that he is bound on his Contracts for necessaries, and then only. When they are of such a nature, that the consideration, may be scrutinized, there are two exceptions. For by a Single bill, an Infant may bind himself for necessaries, tho the consideration, may, not be looked into. But when the rule was established the consideration of a single bill might be looked into, and tho the reason has ceased the Law has not. (Tho it seems now settled that the consideration of a single bill, when a g^d, an Infant may, now be looked into.) It is so settled in Conn.

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And on the other hand he is not bound by an "implied contract" tho its terms are scribble, but when the rule was established the terms might not be looked into, and tho the reason fails the Law remains.

There is an unhappy difference between C^s of Law and C^s of Ch^y. In this respect, those have most rigidly, adhered to the rule, that Minors are bound only, for necessaries. They say, the mind is not bound for money, but tho he afterwards says it out in necessaries. But C^s of Ch^y say he would be liable for money lent and so applied. But why do C^s of Law say he is not bound? I think our rule should obtain in both C^s and the rule of C^s of Ch^y appear to be the true one; for if the land has gone round to the Store, with the Infant and bought the articles, then the Infant would have been bound by it.

Tr,

In Conn there is a Stat^e on the Subject of
Infants Contracts which I think is merely in af-
firmance of the Com Law,

In Eng also an Infant is bound by his -
marriage Settlement Contracts these being inci-
dent to the grand Contract of Marriage which In-
fants are allowed to make, ---

So when an Infant does an act which in
Equity he is Compell^d able to do, he can't rescind this
afterwards, he is bound in Law by this act if he
did it voluntarily; as when an Infant Mortgage
voluntarily personals, or an Infant Co-partner
in a Trade Partnership, or his Estate in Co-partnership.
The acts however must be reasonably sound & be
binding, if any advantage has been taken of them
the Contract will be rescinded.

In England also an Infant may, Convey his
Lands by a peculiar mode of Conveyance called
a Fine. Tho' this may be avoided by the In-
fant during his minority, but not after. For this
act said Law the Books assign the following
Law, 1st While a Person is an Infant the Ct
can enquire into inspection of his Countenance
determine his age; but on his becoming 21 yrs.
of age they lose all Skill in Physiognomy; and
by an actual inspection only of the Infant, the
Ct if they so find him declare the Conveyance void.

2^d That he appears on the Person as an adult &
must be so considered, for otherwise the Fine would not
have been suffered.

Atc.

Whole 730

Mod 137

Other other Contracts of Infants are either strictly void, or voidable, and may on the Infants attaining into a person of them before, be avoided in a Ct of Law.

The question "Whether Infants Contracts are void or voidable" is very important.

I suppose then, think no Contract of an Infant void unless he elects to void it so. If the whole benefit of his privilege of Infancy, can be preserved to him, his Contracts are only voidable; otherwise they are void.

For an Infant must never be subject to any hardship from his Contract. If then I saw a person at law, law for making, a peculiar kind of Law, and an Infant should make such a deed, he would not be subject to the penalty, it is not binding, his privilege would not be preserved.

And the rule that in Sales of Infants, the Contract is voidable only, where there has been a man made or Constructive delivery, must be considered as true only, when by so considering it, the Infants privilege may be preserved.

So also that they are voidable only when they have a compliance of benefit to the Infant.

There is one important proposition that elementary writers differ upon - it is about the consequence of Minors rescinding their Contracts.

It is laid down that if a Minor avoid his Contract executed, he may retain the Consideration, and recover whatever passed to the adult by the force of that Contract. But this is the opinion of the Law, as it is.

3rd Dec. 1794

51-
Vol. 1, page 217
in the edition to C. O.

opinion must not be taken to the extent. For, if
so his privilege would be a weapon of offence, of
fraud, of deceit when in fact it is but an instru-
ment of defence (as Lord Mansfield observes in *Barre* 1802).
The true intent of his privilege is that he can't
cheat others. No privilege of Law warrants such
a detention, where the Consideration received can be
traced and identified in the hands of the Defendant,
for then it might be recovered without affecting
his ~~privilege~~ ^{privilege}. Yet the English authorities would
grant the rule that the Consideration may be re-
tained.

On the ground that the Defendant
may not be bound (and then can be no doubt on the
subject in *Conk*) I think that there would be no
difficulty as to the mode of recovery. Suppose
an Infant sold a Horse and received the Money, &
afterwards avoided the Contract, takes back the
Horse, but will not return the Money; here as well
as in all other cases, where the Consideration was
Money, an action of assumpsit arising out of the
notorious conversion of the money would be the proper
mode, for in all notorious conversions the wrong may
be waived, and assumpsit raised thereon. —
If then the Consideration could be identified Proved
would lie, as when a Person had sold a Minor a
Horse, and got his Note, the minor avoided the Con-
tract, received the Note, but retained the Horse. Here
Proved would lie for the horse. And in the case
above, if the money could be identified (as being in
the hands of the Defendant) it would

a bag) Power would lie. "Question" would not be - Baron
void where the consideration cannot be identified? ^{Essex} ^{Selw. 87}

These Contracts of Minors which are void - Tol 3. 45
able only, are fully binding as to the Adult. - no exception
ing voidable only, in favour of the infant, and - vol 1. 27
this is an exception to the rule that Contracts,
must have a privity, to be effectual.

When a thing is done by authority from a
Minor it is void, a power given by a Minor is
void. This is the only case, where the Contract of
an Infant is absolutely void. In this Mr. Gould
and myself concur, unless he elect to make them so.
- but the point is disputable - See 1 Vern 132,
Cro. Jac 494. 1 Durnford & East or 1 Burr, 44. 1 Salk 279.
1 Mod 25, 1 Vent 51. 1 Searles 440. Strangd 937.
Cro. Cha 303-g. 3 Atk 513. 2 Vern 501. 2 F. W. 243. -
123 Vern. 550. Cro. Jac. 500. Cro. Eliz, 920 1. Levins 86. -
Co Litt 172. 3 Hble 309. 1 Searles 129. ~

III For want of a sufficient freedom of Will
under this head are included the Contracts, 1st Of
persons under duress. 2^d under an undue de-
gree of fear or influence that not amounting to du-
ress, and 3rd Of Times-Covert.

1st Of persons under duress. It is a general rule
that the Contracts obtained of persons by duress are
voidable. Duress is of two sorts. 1st Duress of
imprisonment. 2nd Duress "per minas". -

1st Duress of imprisonment is where one is
falsely

scarcely imprisoned: or the imprisonment being law-
ful. the receiving of tortuous treatment. And a
Contract obtained in either of these cases on the
consideration of being liberated from imprison-
ment is voidable.

2^d Duress "per vias" - is where one from
9th Nov 315 the threats and menaces of another is under a well
Q^o 316, 319. grounded fear of death, or other great bodily harm,
or of imprisonment to avert which he enters into
a Contract. All Contracts so obtained may be avoid-
ed by the plea of duress.

It is a question whether duress of imprison-
ment of Property is sufficient ground upon which
a Contract may be avoided. When entered into, for
the relief of those Goods. The current of authorities
are in the negative: but there are some in the af-
firmative.

So too it is a question whether duress of imprison-
ment of any other person than a
12th May 357 Wife would be sufficient to avoid a Contract. giv-
9th Nov 316-7 ing for their relief. Duress of imprisonment of a
stranger, doubtless would not. But I think it
would be sufficient ground were it of a Father,
Son, or other near relation.

It has been determined (with most very great pro-
pensity it seems) that on a promise to execute a
9th Nov 316 Contract by a person under this duress on the score
of relief, that on a subsequent execution according
to the promise the Contract was void.

It has

A more Particular Consideration of Contracts which
may become void by force or fear.

The principle is that the Contract is obtained without the free voluntary consent of one of the parties. Duress renders a Contract void at Law. Not but Equity has a jurisdiction over such Contracts: but not to render them void. Cts of Equity compel a Surrender or grants an injunction against the execution. Any thing short of a release does not avoid a Contract in Cts of Law: but it will often in Chy.

Duress is of two kinds viz
1st Duress of imprisonment. Consists in falsely imprisoning a man, and then extorting from him a Contract. Such Contract is void. No matter what

kind of imprisonment, his right of loco motion, which is taken away is duress of imprisonment. With regards false imprisonment it makes no difference whether there was a debt or not. The Security thus obtained for such debt, will be void tho the debt remains. It must be a false imprisonment. If a man legally im-

prisoned gives a new Note for a just debt to get at liberty it is a good Note. But if they demand a new Contract where there was no previous debt, this will be void.

Again if a man by hard usage who has been lawfully imprisoned, by putting him into a bad room &c &c and a Contract is thus obtained from him it is void.

2nd Duress per minas, is when a man is induced to enter into a Contract by prevent threatened injury, lest his life be taken limbs injured, or liberty restrained: If to avoid these injuries, he enters into a Contract, it is duress per minas, and the Contract thus obtained is void.

Duress

Co Litt 253

Jerkins, 160

Plowden 555

page 201

Co Litt 482

3 Leon 234

Wolles 687

2 Rolle 687. *Quere* If a man takes a process from a Ct having no jurisdiction and impudens the Detlor. will a Note to brog 440. avoid this imprisonment be void? True the Pff is not liable to any punishment. But this is a wref. -

Alleg 92 *It* said is used in procuring a process in itself to be void. will a Note or Bond given to avoid this be good and binding or void on account of a wref? It is void. the law is a wref. But what then is an unlawful

proceeding in a civil process is it a wref? - No. *Leving* 64. It is civil process not charging the man with a offence. The person injured is not without a remedy. he may sue the aggressor for a vexatious Law suit

Rolle 687. *This* wref must not be to a stranger.

Brook 68 *Supposed* B employs A to falsely imprison C this is also imprisonment by B.

Rolle 687. *Where* a man's Wife or Father is falsely imprisoned or a Son* and the Husband Father or Son gives a bond to obtain their freedom it is by a wref. and the bond is void. This extends to no other relations.

2 Rolle 124 *There* has been some question about a servant and any property - as see the authority cited.

1 Selwyn 555 *It* must be threatening to take life limbs, or liberty, or offer great bodily harm, or else it is not such a wref as will avoid a bond, be given to prevent such harm.

2 Inst 483 *If* a contract has been obtained by a wref. and is afterwards voluntarily confirmed it is a good one. *Quere* -

1 Selwyn 555 *It* was held a wref. when one threatened another harm with a sword and thus obtained a bond.

Rolle 862 *And* that *Quere* what is a writ allowed to a man for some

Something for which he is allowed no day in Ct. As when
 Ct. is the first thing a man hears of another who claims
 a debt from him. So if a man is compelled to con-
 fess Sdg. and Ct. ifues agt him he is allowed this writ.

To avoid this Contract, of course, the Duress must
 be shown upon the man. If it be a pure Contract
 it may be given in evidence. So far goes Law. -

But Confession not amounting to duress must
 be relived agt. Your Chancery Proceed. extending
 the principles adopted by Ct of Law. -

So when a young man counts a rich young Lady who
 was under the care of her mother, and the mother
 threatened to break up the match unless he lay
 down with the rents and profits of the young Lady's
 Land which had long been in her hands. He con-
 plied, and married. There was no duress. But he was
 induced to make the Contract by fear, and Chyrc
 voided the Contract void. This case explains the prin-
 ciple. Yet it is not every fear that operates upon
 a man, which will enable him to rescind his Con-
 tract. As if a man caught one stealing Sheep, who
 gave a bond, and afterwards for fear of public shame
 renewed it. It was good. But any fear unjustly
 caused will avoid a Contract thus obtained,

2 Vind 497
 P. Ct 208
 1 D. R. 118.

3 D. R. 294
 1 K. 19
 1 D. 11
 D. 409
 2 D. 135.

Contracts that may be confirmed & that cannot.
 All such as are void in Law are also void in Equity. 2 K. 158
 i. e. cannot be confirmed by a subsequent promise. 5 D. 20
 1st All Contracts, to deceive third persons, are void,
 and of course cannot be confirmed. This is also.

Applied to fraudulent Conveyances to deceive Creditors,
 But a conveyance made by ^{the} Clerk, is not void but good. tho
 a subsequent conveyance for a valuable Consideration will
 24 May. 153 annul it. Contracts ag^t Public Policy are also
 1 Willm 320, void. So Contracts obtained by fraud.

So where a Contract is under void by Stat. as in case
 of an usurious Note. it never can be confirmed. It must
 be so from the nature of the case.

In cases of apprehensive bargains that may be rescinded in Equity,
 or avoided. or such as the circumstances of the parties lead to
 3d Chy 120. and the person is free and afterwards applies of his relief
 if he ^{not} apply he is bound. i.e. he is bound by all
 those Contracts. So apprehensive by injustice or cruelty as to
 avoid it. Still if he afterwards knowingly confirms it.
 he is bound by it. So when S. made a Will giving
 £100 legacy to P who is poor. B who is rich buys it for a long
 Chy will rescind such Contract. B then sues the Ex^r for
 2d Hume 289 the legacy - they go to Law. and A is notified - but still A sits
 2 Do 294 down and without force or fear confirms the bargain.
 (2d Chy 260) But afterwards he is sick of it and applies to Chy. - Chy.
 refuses telling him he should have come before without

24 May 125 thus confirming the Contract. So another can as it is in
 1 Willm 301

As long as an influence arising from the transaction be
 1 Hume 237 used the parties remains the Confirmation is void - The
 2 Vind 121 C. filed a bill ag^t a man on one of these extravagant bonds. the
 1 Willm 320 man was obliged to confirm it as he could not comply with
 the alternative of the demand then made upon him viz. refund

3d Hume 222 the small sum for which he gave the bond. - In a case in
 A Lunatic gives a bond and when sane confirms it he
 is bound. So of an Infant and a man intoxicated be -

It has been determined that a bond given to a third person on the score of relief is equally voidable with one given to the person inflicting the duress. For it matters not to whom the bond is given if it be obtained by duress. Duress cannot be given in evidence under the *Q. J. Act*, but must be pleaded specially (c) it must be pleaded upon the record.

A Contract obtained by duress may be confirmed after the person who made it ^{has} obtained his liberty, the Confirmation being made under full knowledge of the void quality of such Contract.

Ch. of Law relieves agt. Contracts obtained by duress. A security obtained by duress for a just debt may be avoided but the original Contract revived again. When one becomes surety for a bond obtained by duress, he is bound thereby. * page 257

2^d of persons under an undue degree of influence or fear tho' not amounting to duress.

Contracts given thro' fear of loss of property or loss of reputation, or of battery. *Ch. of Law* will set aside agt. 3d Wm 394
on the same principle that *Ch. of Law* will set aside those obtained by duress. "No want of freedom of will" - tho' tho' those obtained by duress may be set aside tho' that fear, influence or restraint is removed be confirmed. But *Ch. of Law* have not where a Contract has been made thro' a just fear and or revocation of a parent, master, friend, and where that Contract obtainable, confirmed has been procured; set it aside tho' there may not have been a perfect fear. 11 Vesey 11
3d Wm 132
118

perfect freedom of will in the party contracting.
If such Contract however had been unreasonable,
Ct. could have set it aside. -

*See page 124-5th
vol 1. -* **3rd Of Feme Covert** This has been
fully discussed under the title of Baron and Feme
But it will be well to lay particular Cases, where
she may be bound by her Contracts. -

The Gen^l rule is that a Feme Covert is not bound
by her Contracts. they are void. There are many
Cases where her Contracts are binding on her Husband
not on herself. and others where they are binding on
herself alone. There are only two principles on which
this is founded; one is for her Husband's sake, and the
other is on her own account. One ground of this
being voidable as agt. herself is that in legal presumption
that she has not sufficient freedom of will being
liable to be coerced by her husband. And the ground
is that if she were allowed to contract the married
rights of her husband might be affected. And either of
these objections raised the Law would not validate her
Contracts. These objections being removed she is
equally capable with a Feme sole to contract and
bind herself or property thereby. - Thus the wife of
a man who was banished the realm could contract
could sue and be sued in her own name. In this
Case his married rights could not be affected and
there could be no possible coercion, as he had no ac-
cess to her. -

Coverture alone does not render a woman
in-

incapable of contracting, for here the husband and wife
living. I know it has been said that here the husband
is "civilized manum." But this is not so, for then she
would be a free sold. capable to marry again.

Again where a man has abjured the realm.
and his wife may contract. This is out of practice
now; but the same reasons exactly in point ex-
ist as in the last case.

Again it was the opinion of the Ct. that the
Wife of an Alien-enemy might contract so as to bind
herself. She could not enjoy the company of
her Husband - he could not live in the Country. his rights
could not be affected - and there could be no coercion
she must live as well as others, and therefore she
may contract.

It was determined and that in the last case
not contracted. that where a man was banished
for 7 years. his wife might contract so as to bind
herself for the same reasons as those in the above
cases. In these two last cases there could be no idea
that the husband was "civilized manum." these cases
have never been shaken.

Since these cases it has been questioned whether
a woman living separate from her Husband and by
agreement could contract so as to bind herself?
Formerly the decisions were that she could bind her-
self on her contracts. - but several later decisions
say she is not bound. They go so far as to say that
the former decisions were not founded on principle.

It is an important question and as yet unsettled
 I think she is bound by her Contracts; she is out
 of the power of her husband. - there can be no coercion
 - nor can his marital rights be affected. He has
 entered into articles with her to live separate, and has
 allowed her to separate maintenance; these articles
 in England are held to be good, and to bind him, by
 them he renounces all right to her person. Therefore
 there can be no objection on his part, why she should
 not be bound by her Contracts. he has nothing more
 to do with her, and it is immaterial to him whether
 she lives in a palace or a dungeon.

The ground on which she is bound is "the agree-
 ment to live separate," not because she has a sep-
 arate maintenance allowed her. If you put it
 on the footing of her separate maintenance, then
 her liability would be only so far as he is freed from
 her Contracts. But it must be by these articles to
 live separate, then he has renounced all right to her
 person, and there can be no coercion. The leading
 18th Sep. 5. Case is that of "Corbett & Palmitz," by which also
 the rest are governed

I will now examine the cases opposed to this; it
 must be confessed that some of them are opposed to
 the principle then held, & of that her liability
 was on account of her separate maintenance.
 24 May 145. But if the only ground was that the wife was liable
 on an ^{old} ~~old~~ be then none of the cases are opposed

In the last case I shall mention the Wife

closed

eloped from her Husband and lived away from him
 she was not bound by a Contract she made. But re-
 marked that in this case she had only, eloped. He had ^{11th Rep 1079}
 never renounced his rights to her he might have claimed
 her at any time. Hence to suffer her to have to be
 taken on ^{God} Ex. would have been to deprive him of the
 use of his Wife. whenever he wants to claim her

In another case they lived separate. There was
 a voluntary separation, there were no articles, and ^{11th Rep 1998}
 therefore as he might put an end to that separa-
 tion when he pleased it is not opposed to the leading case.

In another case when a pauper's D. was bro't
 agt the Wife she pleaded Coverture. The Courtroom ^{4th Rep 768}
 for the decision in that case must have been that
 there were no articles of agreement to live separate

Another case is not of much importance, as
 in the above cases they lived separate, but there were
 no articles of agreement. A Suit was pending in ^{5th Rep 670}
 the Consistory of between them, while it was pend-
 ing an alimony was allowed her and saying that
 hence she contracted for goods, and it was said they
 were furnished on her credit. But the replication
 was considered bad. - This has no resemblance to the
 leading case.

Another case when she separated
 from him, and lived elsewhere. The goods were ^{5th Rep 604}
 sold on her credit, she died and a suit was bro't
 agt her Ex. It could not be sustained, there

was no Covenant to live separate, and the property went to the Husband and not to the Ex^{or} -

82 Rep. 546

Another said to be very important and to overrule the leading case. But I think it does not. If the parties rest on the ground of husband and wife maintained that they are separated. If not, but on their living separated by Covenant then they are not separated. In this case there was an agreement allowing her so much to maintain her as long as she lived separate. Then so long it was good. But he might claim her when he divorced. There is another case - But I think the case of "Corbett & Pollock" can never be overruled. Whenever the husband has renounced all right to her property (person), she may contract.

There is another exception when the wife may contract during the life of the Husband viz. She may sell her property, and no body can hinder if she joins her Husband. In England it must be done by a particular mode of conveyance, viz. by Fine. When she has thus conveyed she is bound by it. But if she had joined her Husband in any other mode of conveyance she might afterwards render it void if so disposed.

24 Rep. 426
vol. page 131

There is a case when a wife covenanted to convey her Real Estate and it was enforced by the Chancellor after her death. If she had conveyed we would know it had been good. It is said in Corbett

go into the equity of this exception, but must go by the strict rule. It has been determined in *Conk*, that "If any person is vested with power to do and act, and he binds himself to do it, he shall be bound by it" - This that Country a wife may join her Husband in any, of the ordinary modes of conveyance.

In England if a wife convey, "and *1 Coke 43*
and recovery," and the Husband does not disagree to *1 Wils. 329*
it, it binds her and her heirs. The husband may dis- *Co Litt. 3*
sent to it, for then his marital rights would be af-
fected: he could not have the use of it. Which he
would be entitled to during his life. Provided they had
children. If they had no children and he had not
disented to it during his life he would be bound
by it.

If the husband or not dissent he has *1 H. Blk 143*
waived his right: her conveyance is as good as his *Conveyances at the*
if his marital rights be not affected. *Law on the subject*

In this case in *W. Blackstone's Reports*, the Hus- *Sepia -*
band and Wife had entered to live separate he had
renounced all claim to the usufruct of his Wife.
She conveyed her Real Property to a third person by
an ordinary mode of conveyance, and it was held
good, his marital rights were not affected he had
abandoned, and renounced all right to the Property
by the Covenant.

The question then arises why may not the
Wife convey her property in this way, "viz" that it
shall be the Granted, & the Husband's right
is at an end, &c. She cannot for this reason, viz
there.

Vol 1 page 133.
Vol 5 page 328

There is a stubborn rule of Law, "That a free-
hold estate cannot be conveyed to take effect "in
future" Then why may she not do it by way
of remainder? Thus there is another stubborn in-
gilding maxim of Law "That any remainder
must be limited on an Estate created at the same
time the remainder is." If it were not for
these two ingilding maxims she might convey
when her marital rights were not affected.

The first maxim does not hold in Conn,
what would be good by way of Executory Devise then
would be good by Conveyance.

Conn per 201

It is said the Contracts of Jones-Coveat are
void, - this is quod, tho' not always true. The Law
has privileged her not to be bound. She cannot Con-
vey her Personal Property at she may as we have
seen before. Convey her Real Property in a proper
manner. This is her privilege. She may
annul her Contract or ratify it, as she pleases
it must therefore be considered as voidable only.

Suppose she makes a Lease during Con-
tract and after her Husband's death renews it
this is a confirmation of the Lease. But if you
consider it void absolutely it would be a "void and
factum" as though there never had been any Contract.
It would be absurd to say it is void for that Case
she might enter upon him at any time, even
during the life of the Husband and without making
any request, it is therefore only voidable.

If property be given to a feme-sold for her se-
 and use, she may be bound by her Contracts. 2 Atk 879
 the Law in this Case, does not consider her in a state 2 Wms 142
 of Coercion, the property can never come to her 1 Bro C 16
 husband, she may be bound, but not in such a
 way as to affect his marital rights: therefore she
 can't be taken on Co. - But Chy. will issue a re-
 cord not agt her person, but agt her property if it
 can be found.

At Law it has been held that a Contract
 between Husband and Wife is executory is not good,
 that he cannot convey to her. But he may con-
 vey to a third person, who is bound to convey to the
 Wife. By this means the maxim is kept up -
 that Husband and Wife are one person in Law, and
 therefore cannot contract with each other. But
 you perceive this is not essentially true, for by the
 intervention of third persons, he may convey prop-
 erty to her, and directly to her by way of Trust and
 use. I have already expressed this method of
 conveying to the use of another.

And when the Wife has separate property, he
 may bind himself to her therefore, according to the
 common modes of Contracts, see Baron & Feme. -

I will here notice that an Alien can hold no
 Real property. But can he contract for real prop-
 erty? It is clear he can't hold it, it may be taken
 from him on the principle of policy. But still he
 may contract, the property goes out of the hands
 of

At the Grantor, the next movement it may be taken from the acieed Grantor. The honest-fair way would be to make it absolutely void, and then the grantor would have to pay him back the price; but the Law is otherwise.

An alien friend may contract for personal property in the same manner that any other person can, except that he cannot have a Lease of Land; he may have a house to live in, and carry on merchandise. An alien enemy can execute no contract. The contract is not void but may be enforced after hostilities cease. Contracts of Americans have always been enforced until lately. So of Ransom. Bills

III From the intervention of Error or mistake, Contracts may be set aside in Chy, but not at Law. when error, mistake or ignorance of facts was the "Sine qua non" of the bargain. But when the error was not the "Sine qua non" of the Contract, the Cts of Law give a compensation in damages; they don't set the Contract aside.

But yet if the Contract was a compromise of a disputed or doubtful title, the compromise of the dispute is a sufficient consideration to make the Contract valid, even tho' the Contract would not have been made but for the error or mistake of the parties. yet Chy. will not interfere, and set such Contracts aside, nor will compensation in damages be allowed.

But when without any such compromise of a dispute an error or mistake is the sole cause of the Contract, or bargain, Chy. will set it aside. But when the error or mistake intervenes the Contract would notwithstanding have to stand made Chy. will not set the Contract aside. but it may be relieved agt. in damages.

It has been already noticed under the head of Legacies, that when a Legacy was given to a young woman on condition that she would not marry without the consent of her mother or some other person named the restriction was void, and the Legacy vested independently thereof; this is so the grounds of the case, A young Lady, not knowing this to be the Law married without the consent required in the will; a dispute arose between her and the other Sisters as to their shares; a compromise took place, but one of the Sisters being dissatisfied, brought an action agt. the married one, objecting to her having any share in the Estate on the ground that she married without consent, had forfeited her right to what was to come to her on the death of her mother, and in order to get rid of the agreement insisted that they executed the articles under mistake, So Hardwicke directed them to be carried & specifically into execution, remarking that there was nothing more mischievous than to make a forfeiture after an agreement which if there was any mistake it was the mistake of all the parties to the articles, and no one of them was

more under an imposition than another.

Cowper 37, See a wagering Contract between Jones and
 Sayer and
 Paine 140, Randal "to the validity of which it is not essen-
 tial, that the event be in itself contingent. It is suf-
 ficient that the event be equally uncertain to the
 parties."

But where an assent has been given to
 a bargain, under a mistake of fact, it is said to
 be sufficient to warrant the interference of Chy.
 Paine 310, Therefore where one being a freeman of London
 Paine 145, having a Son and Daughter made a will, giving
 "inter alia" £10,000 to his Daughter on condition that
 she should release her aphanage part, together with
 all claim or right to his personal Estate by vir-
 tue of the Customs of the City of London or otherwise
 and make his Son his Ex^{or}, his Daughter being
 about the age of 23 years. And the Daughter after
 having been informed by her father, that she had
 an election to have an account of her Father's person-
 al property, or to release her aphanage part settled
 the legacy, and executed a release of her share under
 the Customs. So Talbot on application by her
 after taking husband, to set this release aside on
 the ground that her Customary share would have
 been £40,000, was refused, because he said
 he had thought she knew she was entitled to have
 an account taken of the personal Estate of her
 Father, in order to ascertain what her aphanage
 part would amount to, and that when she should
 be

be fully apprised of that then and not till then.
 She was to make her election. For probably she
 would not have elected to accept her Legacy had she
 known what her orphanage part amounted to. So
 for she waived it and accepted the Legacy.

But ignorance of Law is not sufficient to ex- 3d. Am. 3161
 cuse any one, as to Sd and a Contract. For the Monthly Ref. 364
 maxim is "Ignorantia Legis neminem excusat"
 This maxim is certainly true as to crimes, and of-
 fences, but it does not apply in all cases to Contracts
 For ignorance of the Law has been the ground of
 setting aside many Contracts. I will state one
 instance a bond was obtained from a man by
 duress, which in good conscience he ought not to have
 entered into. afterwards he renewed that bond.
 The Chancellor said he would relieve against that bond
 because he was ignorant of the Law. he supposed
 that because he had once given the bond tho' by
 duress, he was bound to pay the money and there-
 fore renewed it

Another is commonly known by the name of
 the "School Masters" Case. There were three brothers
 in England to whom a landed Estate descended. they
 did not know what according to the Law then, the
 eldest was entitled to it. They were ignorant and
 did not know how to proceed, they applied to a
 School master in the neighborhood, who said that
 the youngest should take all the Estate, "because
 he said so." The other brothers not being
 satisfied

Satisfied with this, they all agreed to divide it equally between them. The Court believed ⁱⁿ this, altho' it was a mistake in point of Law. Now this is a strong Case. I believe the Ct will do ways which show the mistake is evident and clear. There may be Cases where there is a strong presumption of mistake, and yet it cannot be ascertained.

See a Case from the Civil Law where a female Slave was eloped and sold as a male: the purchaser did not wish a female. The contract was set aside. Here the male was the "Sine qua non" of the bargain.

On the other hand see a Case where ignorance of the Law did not excuse. An ignorant man had retained a bill of Exchange three weeks after acceptance was refused, and did not forthwith give notice to the person from whom he received it. The man continued in good circumstances during those three weeks and then failed. The person who had retained it had to sustain the loss, for not giving the notice which the Law requires, altho' he was ignorant of the Law.

There is much dispute among Lawyers, when an article is purchased that is defective, neither of the parties knowing it. Here as there is no fraud, and where must the loss fall? It is said on the "buyer's" side, "Why not let it fall on the seller." The Case is the same as where a person gets a counterfeit bank note from a person who did not know it.

to be Counterfeit. There was no fraud intended but the giver must take it back again. I think it is decided by the rule of Law that in every sale there must be a "quid pro quo" - as in the Chancery words "a man must always pay to take money received by selling moonshine" - This principle will always direct you. The seller should suffer the loss.

The money may be had by an action on the Case for money had and received, not on fraud for there is no fraud intended. If there was a total mistake throughout the contract is void.

If the contract be concerning Real Property it will be rescinded by Chy. if it be of personal property, the money may be had as above mentioned. But in the case above if there be only a partial defect the money will be damaged.

Sometimes a person may sell an article worth 100 Pounds 150, not having any idea of fraud, and yet the Contract is not wholly to stand. All the difficulty in all the above cases is to make out that the party was ignorant of the facts.

IV Because Solo. Vain useless, or Negatory. Physically impossible and Morally impossible.

Because, ~~void~~ vain, useless, or negatory, Courts will not enforce and enforce such Contracts because it is beneath their dignity, and they have sufficient other business. D

2^d Because Physically impossible. By contracts of this species are usually meant such as are impossible in the nature of things (as that a man should run ten miles in a minute).

Such it would be unjust in the Law to attempt to enforce. Therefore they do not. And if a Consideration be paid on the faith of such a Contract it may be recovered at Law.

Contract 117.
see vol 3,
page. -

But where one contracts to do a thing that to him is impossible (as to convey Lands of which he is not the owner, or to pay a sum of money when he is not worth a farthing for) here for non-performance of Law will give Damages: and where the impossibility arises from the Contracting party's own act or default (as where he contracted to convey Lands of which he was the owner, but finding a better bargain disposed of them otherwise) the Law will give a specific performance or a penalty sufficient to stimulate to performance so that he may comply according to Contract.

There is a Set of Cases which have introduced a new Principle into the English Law as to the rule of assessing Damages for a non-performance which Cases I think may be classed under the head of "Physically impossible Contracts. They are such as are obtained by a man skilled in any art or Science by overreaching another not so skilled, and which one would therefore suppose might be avoided on the ground of fraud in taking advantage of the ignorance

ignorant situation - as where a man unacquainted with the powers of numbers, agreed with one well skilled in them to deliver him in Contract. 22d May 1164 created a Pathway sum of money two kernels of grain on the first Monday of the year, and so doubling it on in an arithmetical progression each Monday thro' the year for 10 years, this on Calculation would amount to more than all the grain in the world and therefore I suppose might be avoided on the ground of its being naturally impossible. But Chy. having not so considered it, has established this rule for giving damages that they shall be according to the ^{value of the} consideration received and not according to the article engaged to be delivered.

I think the establishment of this rule is not founded in principle, and that the Contract ought to be considered as strictly void, and that it would be so considered at this day.

If a Condition be entered into at the time a Contract is executed, on the non performance of which the Contract is to be defeated, and that Condition be comes impossible, the Condition only is void, the Contract cannot be defeated, but remains good.

But if it be an executory Contract, and the Condition becomes impossible, then there is an end of the Contract (i.e.) if it becomes impossible by the act of God, or the obligor's own act. But if the impossibility arises from the act of the Law or the obligor, the instrument is still valid. When

When the hazard of the act or things becoming im-
possible by the act of God was contemplated by the
Parties at the time of making the Contract, the Con-
tract is not by such act rendered void, but the Oblig-
or will be liable in damages for a non-performance.

And when a thing contracted to be done is
rendered impossible by the act of the Law that Con-
tract is void unless the hazard was contemplated by
the Parties.

Co Litt 206 Condition of which is impossible at the time, and
D. 206, Condition only is void, and the bond good. I think
1 Salk 172 this is wrong, a bond suffering from a Covenant-
only in form, and a Covenant to do an impossi-
ble act is void. So also a bond where the impossi-
ble condition is incorporated therein.

Co Litt 206 If a man enters into a bond to do an unlawful
17th Ed. 257 act, both the bond, and the condition are void.
Hobbs 1420 If the condition only be impossible, the condition is
void, and the bond good.

If an Estate be given and an impossible Con-
dition precedent be annexed to it, the estate cannot never
vest. It is otherwise when it vests in the first
place with a condition annexed, and non-performance
of which it was to be defeated, and that condition
becomes impossible, here the condition alone is void,
and the estate cannot be defeated. So also if
the Grantor prevents the grantee for performing
the condition the Estate vests.

3rd Of Contracts. morally impossible.

All Contracts are morally impossible when their object is directly or indirectly, "malum in se", or "malum prohibitum". All such contracts are wholly void, whether covert or overt, in whatever shape they may appear, whether the illegality be in the consideration or in the thing to be done.

They are void, as to the person paying the consideration, and as to those to whom it is paid. Therefore he may retain the consideration tho he do not perform the act.

So where one has done an illegal act on the faith of a contract to pay him a sum of money or other thing, yet he cannot enforce that contract it is wholly void. So you will perceive that any contract to do an unlawful act, is void, or a contract to pay another for doing an unlawful thing is void on the ground that it is unlawful.

All contracts that tend to encourage a breach of the peace are void (i.e.) unlawful, as if a man say a wage with A, that he cart-whip B. All contracts that have a fraudulent object in view are unlawful, equally so as when the contract had fraud on the face of it.

Any engagement to do or to indemnify another for doing an unlawful act are void.

So also if the engagement be to pay another for omitting to do a lawful act (which it was

Revd. 182
1st Will. 322
D^o - 327
7 P. R. 543
8 D^o 89

Cowper 39
Per Eliz. 199

10 Mod. 159
Cowper 341
10 C. R. 100

4th Rep. 460 his duty to do, it is void. So also if a Sheriff
 7th 475 take a bond from his deputy, that he shall do no
 1st 55 business, and serve no writs, except those of a
 3rd 17 particular kind, and not exceeding a certain
 1st 164 amount, it is void.
 2nd 170, 195

Of Usury.

Usury in its modern acceptance, is the taking of more than legal interest for the loan or advancement of money, which is contrary to the Stat of England, and almost all other Countries.

At Law Usury was no crime. The first Stat that made it penal was in the reign of Henry 7th or 8th. That Stat^o allowed 10 per cent, to be taken. The rate 'per cent' was raised by different Stat^s. The rate is fixed by Stat^s both here and in England. Hence to take more than the rate allowed is a Stat^o offence. The English Law, (copied in most of the States with some variation in 'per cent' and 'penalties') - declares that all instruments on which more than legal interest is reserved, shall be wholly void. But for such reservation the obligee is subject to no penalty.

2nd "It forbids the taking of usury under a certain penalty." Therefore under this Stat^o a person may forfeit his obligation, and not be liable to the penalties of the Stat^o. And he may be liable to the penalties and not forfeit his obligation. And he may both forfeit his ob-

ligation

Obligation, and subject himself to the penalties of the Stat^e.

For where too much is preserved or incorporated in the obligation, but no more than legal interest has been taken the obligation only is forfeited; it may be avoided by a plea of Usury.

Where more than legal interest is taken but not preserved, in the obligation; the penalty only is incurred. If it be not reserved in the obligation the taking of even so exorbitant a sum afterwards only subjects to the penalty. The Contract itself is not void.

But where too much is preserved and too much also taken, the obligation is forfeited; and the penalty incurred.

The object of the Stat^e of Usury, is not to do justice between the parties, but to prevent the practice of taking oppressed or more than legal interest. Therefore any person who actually takes more than legal interest is liable to the penalties of the Stat^e. (which in England is twice the value of the property loaned, in Conn^t and most of the other States, just the value of the property loaned) which penalties any person that will sue for the same can recover, one half to the State, the other to himself.

If a person lending money takes a certain sum out of his pocket, which sum is the measure of the obligation, but lends it on condition that the borrower return a certain part thereof as premium or that he keep the whole identical sum, and pay the premium out of his own money: this is essential

by

2 Rep^r 241

2 Rep^r 250.

Daugh^t 223

12th 234.

Q^o 250

2d Rep^r 207

3d Rep^r 537

7th Feb 184

3 Wilton 250

2 Lining 393

Butt - 70.

essentially the same as to have received too much in the Contract without the ceremony of taking it out of his pocket, and then retaking it as a premium. For he in fact lends so much less than the sum stated in the Note, as is the amount of the premium. Therefore this as effectually destroys the obligation, as does the usury without the ceremony. But on this ground the taking of ever so large a premium cannot be considered as taking usury, and of course cannot subject the lender to the penalties of the Statute. But we must deduct the premium from the amount of the Note, and the remainder is the sum actually lent; and on this remainder legal interest may be received. But the moment the lender takes more than legal interest on this, he takes usury, and incurs the penalty thereof. E.g. It applies to B for a sum of money say £100. B says to A "I will lend it to you but you must return me £10 of it, or pay me £10 out of your own pocket, as a premium." A agrees to the proposal. A performs the condition, and then gives a Note for the £100. This Note is usurious, and therefore forfeited, for he lent in fact but £90, of course there is £10 too much provided in the Note. But B's taking that premium does not subject him to the penalty, for it cannot be considered as interest or usury. It is considered as if he had merely taken it out of his pocket. But if B

at

at the end of the year. Trevious interest for more than
the £90. he from that moment is subject to the "pen-
ally."

Notwithstanding the Stat. of usury, more than
legal interest may be taken on the ground of haz-
ard. This hazard is of two kinds - Real and Fic-
titious, or Colorable. When there is a real "Good
fied" hazard (i.e.) where the Principal (not the in-
terest alone) is liable to be forfeited, on the happen-
ing of some probable event, than tho' ever so exorbitant
usury or enormous, interest be taken it is not usury.

And on this ground stand "Bottomry or respon-
sion Bonds" Annuities &c. But if it be the inter-
est only which is at hazard, the taking of more than
legal interest is usurious.

But when the hazard is Colorable only (i.e.)
fictitious, a pretext or device, a shew of hazard, merely
to evade the Law, such hazards are of no effect, and
do not prevent the Contract from being usurious.

The hazard would be Colorable, were one to
lend money and take a bond thereof at £10 per Cent
but liable to be forfeited if the obligor died on the
morrow. But the hazard would be Considerable
if one should lend money, and take a bond thereof
at £20 per Cent but liable to be forfeited on the
death of either or any of the obligors ten children
within ten years. But there are cases in the extreme,
the middle ground is the doubtful and difficult. It
is determined whether it is Colorable is difficult.

And

1 Shaw 8
Cro Jac. 308
Cro Eliz. 43
4 Rep 355
Morr 398
3 Wilson 390

And the hazard must at all events be such as was contemplated by the parties as a real hazard, and not as a fiction or device to evade the Stat.

Pro Eliz 64B
55 Rep. 59
Carthens 88
1 Benth 231

1 Benth 233
Cooper 114
2 Benth 238
3 D. 531
1 Atk. 301

There is no set off for $\frac{3}{4}$ the 1000 per annum this is more than legal interest, but is permitted from Custom.

The object of taking more than legal interest, must have been the loan or forbearance of money, to constitute usury. Therefore any collateral enhancement of the price of any collateral article, in the way of bargain or sale, or the trust of it is not usury. But if the condition of a loan be, that the borrower shall take a certain collateral article at an enhanced price, his thus taking the article with the loan, makes the whole contract usurious. For here a borrowing and a loan of money were contemplated, as it was the taking of usury for that loan under the cloak of a sale. And it is even sufficient if the minds of the parties meet on a loan to constitute usury, if more than legal interest is taken, let the taking appear in whatever shape it may. For it is a maxim, that the Stat of Usury, by no fiction, cunning, or device whatever, shall be evaded.

2 Vent 83
Cro Jac 577
Cro Cha 501
16 Benth 277

To make a contract usurious, the agreement must be a corrupt one. Therefore by whatever means or great a sum has been incorporated into the obligation (without its being the obligor's intention to take more than legal interest) whether it be by mistake of fact or of law it matters not, it is not usury, if

Therefore if one in summing up his account should mistake one figure for another and thus make his balance too large, and incorporate that mistake in a Note that incorporation would not make it erroneous it being this mistake of fact

So if under a mistake of the Law one should adopt a mode of computing interest different from the legal method, and thus get more than legal interest yet this would not be ruinous. It might here on the face of it appear ruinous. But the parties are admitted to 'prove the mistake. If an action be brought on an assignment and there is usury in the Note, you may give it in evidence. If it be a Specialty you must plead Specialty in, & plead it on the record. This is an exception to the gen. Law

Now convey you may say, Law 'prove usury on the gen. Spec. but the Ct. have established the rule that the party intending to plead usury must give notice to the other party of such intention.

The Law seems in the two following cases to have stated a little of its mind. - So when a Note is given payable in 6 months, it is now settled that 2 1/2 per cent may be taken, - which is a little more than 6 per cent per ann, the legal interest here. So when a Note has a little run over a year, on settlement there may be interest taken for that part of a year bearing the same proportion of 6 per cent, that -

that

that part of the year does to the whole. It is also the settled rule now tho' it was formerly otherwise that the year interest may be ^{paid} ~~received~~ before the end of the year, or at its beginning, as is the customary way in Banks. These innovations on the strict rule of legal interests are founded on a principle of convenience.

If a contract be so formed that it is in the power of the obligor to discharge it 'provided he pay the promised and ^{simple} legal interest within a certain time, this contract is not usurious, tho' even so exorbitant interest is to be paid on account of such payment. For here if the obligor has to pay that exorbitant interest it is his own fault. he might have avoided it by paying at the specified time. And this accounts for the doctrine of Penal Bonds, the penalty of which was anciently on non performance voidable. But tho' this power is placed on the contract to be given the obligor, yet if there be a separate agreement, (tho' by parol) to let the time when the obligation may be discharged run over this agreement corrupts and makes usurious the whole contract.

A loans £100 to B, and receives a Note from him for £100. and legal interest. At the same time there is a parol contract between them that B shall pay £10 per cent per annum. The question arises whether the completion of this parol

Parol Contract attaches to and pollutes the Note?

It was determined in the Sup^r Ct in Conn^t 3 against 2 in the affirmative. On Error to the Supreme Ct that judgment was affirmed by a majority of one only. I doubt the propriety of this decision, and think as there is a diversity of opinion among Lawyers on the subject it may still be considered as a disputable point. The support of the decision it may be said. 1st That a separate ^{1st Huttons 218} Parol Contract to give money is equally binding ^{Cro Jac 508} with a written separate one. (and it is settled that ^{Long & Jeff-les v. Smith} ^{the Law is void} a written one pollutes the Note Contract) and ^{Page 112} that the performance of either the one or the other ^{D^r - 672} depends on the same consideration viz the honor ^{2^d Rep. 233} of the obligor. Therefore Consistency favours the decision. ^{D^r - 238}

2nd That the case is analogous to that where an obligation for a loan of money is given for more than legal interest provided the obligor do not cancel the obligation by paying the principal and interest by a certain time. So far that Contract is legal and unpoluted. But if there be a Parol agreement at the same time. No let us say when the obligation may be thus cancelled run over, this Parol agreement, depending merely on the honor of the party for its purpose and not on the honor of the whole Contract -

In answer to the first argument it may be said that tho' true it is the written & Parol

Contracts are equally void and tho the performance of each depends on the same consideration yet the ^{part} contract carries its pollution its death in its very front. No action can be brought upon it. it cannot be relied upon but as it is

page 325-67 all its contents must appear even in the declaration. But should the promise be put in writing, all the contents is then shown behind the curtain. the writing on the face of it appears valid and action may be had upon it and nothing can prevent a recovery but actual proof of the corruption of its consideration. And this essential difference in the effect of the two contracts it is presumed is sufficient to warrant a different decision concerning them. And it is contended a ^{part} agreement thus made differs not in species from the promise of the borrower of a loan made without the request of the lender to pay him a certain sum over the rate of legal interest, and upon which promise the lender replies "I have no demand upon you for the extra sum. you may pay it or not. I depend on your honor only for it" —

This clearly is not usurious yet a promise thus made is as binding as the ^{part} agreement made depending on the honor of the borrower, and that alone for performance.

It is no contract that was just and becomes usurious afterwards, yet a contract that was usurious can be purged of its corruption. For.

For if a Note or Contract usurious be disposed of by Will this may be a renewal in the hands of the assignee or legatee he is purged of all its corruption.

So by the promise of the obligor I think the obligation might be made valid, or the obligor become liable at least to an action on his promise. By renewing it in the hands of an assignee it is purged. If the giver of the Note intended to have avoided it he should have sold the assignee of it before renewing it, and then he might have come on the assignee. But by the renewing of it the assignee is discharged. If the giver of the Note could avoid it, the assignee or holder is owed ^{the money} ~~the~~ money. (When a Note is renewed, the endorsements up on the old one, are all null, and the security is on the person alone who renewed the Note.) Suppose the holder of the usurious Note had died intestate and it came into the possession of a person entitled under the Stat of Descent, here if the Note is renewed in his hands it is purged of the usury.

If the Note had been avoided previous to the renewal of it then the person to whom it descended *Moore 752* would not have been the loser. he might have *7 Mod 119* come upon them ^{properly} in the hands of the heirs.

But by renewing the Note he waives this, and cannot afterwards come upon them. On this ground it is that if the giver of a Note renews it in the hands of an assignee legatee or representative. It is purged of the usury and he can afterwards avoid it.

But

That if it comes into the hands of any other person than a Representative, Officer, or Delegate, who it be renewed it does not pay the money. For the rule is that so long as it remains in the hands of the obligor or any one standing in his place (as his Ex^{or}) no subsequent act or renewal validates it may be avoided by a plea of Usury.

And it has been decided in Conn. that when a usurious Note was renewed in the hands of a third person, altho' he knew it to be usurious yet there need not pay the Usury, and the Note could not be avoided. "Quare" is this English Law?

There has been some question whether if the usurious Note was negotiable it would not be altered in the hands of a third person: but it is settled that it does not alter it at all: the Act says the Stat^e is too strong for them, altho' it would be much more consistent with convenience and made to have it altered.

Day's Rep.
last Volume
Gilbert 45-

concord
837 p. 3924
Belmont 884

It gives a Note of hand that is usurious to B. A. H. and he complains that it is usurious, and will not pay it. B. does not insist upon it. The old Note is thrown up, and A. gives a new one for the principal and legal interest leaving out the usury; is this new Note usurious? The argument in the affirmative is "the first Contract was usurious, the whole contained in it was contaminated, the new Note leaves out the usury, but all the rest is contaminated. Does this argument have

Con-

conclusion? I think it will hardly satisfy the mind.
 The Ct in Conn have determined that the new Note
 was not usurious; the usury is purged by the 7th article
 and what was usurious in the old Note is now left ^{8th}
 out. there is no harm done. No authority was produced ^{1st S. Rep. 584}
 on the decision. none of the Cts knew of any author-
 ity on the point. But afterwards in in "Carnell's"
 Reports which lately came out published in num-
 bers, there is a similar case reported. where the de-
 cision is given on the very same grounds as that in
 Conn.

A gives an usurious Note to B. B will
 not take it. A says to C will you give
 your Note? C gives his Note to B and A gives C
 a Counter Bond to indemnify him. C is sued and
 pays the amount of the Note. and then brings his
 action agt. A. Can he maintain it, or in other words
 can A avoid the payment? ought not C to have
 let A come in and plead the usury, and thereby
 avoid the Note? - Whether C knew of the usury or
 not it is decided he will recover in the County -
 and give no indemnity him.

I will mention a case in which you will
 find no authorities, unless there be some since the
 commencement of "Ct. Reports." - it is this "Noy"
 Case a person had a new trial granted him
 who has failed to make out the usury on the
 former trial? - If he produced satisfactory proof
 that there was usury, and that he can prove it.

Can.

Can he again plead *non est*? He failed in the first
 trial for want of proof. Which he has since dis-
 covered, tho' he did not know of it at that time,
 this in other cases would be sufficient ground to
 grant a new trial. But the reasoning ag^t grant-
 ing a new trial, how analogy is strong. It is
 a rule if a man laid in a suit for a penalty
 on a penal Stat^e he never afterwards can have
 a new trial, altho he could afterwards bring for-
 ward sufficient proof. This is very near a kind
 to the rule in Criminal trials, "That a person
 can never be put in jeopardy twice for the
 same offence." The object in inflicting those pen-
 alties is to punish the offender, not to gratify the
 informer. Now apply this to the case in question,
 was the penalty in *assay* to gratify the man
 prosecuting, or to inflict a penalty? It was to
 inflict a penalty to punish the man, and pro-
 hibit the practice in future. He should have been
 once in jeopardy. The case has never been settled
 mind: but the reasoning, how analogy, above
 is very strong, and Conclusion that there cannot be
 a new trial granted.

The late *Legal* interest is different in
 different places, and the Gen^l rule is "that the
 interest which was legal in the place where
 the Contract was made, shall be the interest to
 be recovered." tho' the obligor be in a place
 where the interest is less. — Therefore if a man

gave

give another a Note in N York (with legal
interest 7 per cent) and then comes into Conn. he
may be here said, and "7 per cent" understood, here
where 8 per cent is the legal interest - So on the
other hand if a Contract be made here to pay a
sum of money, and legal interest, that Contract tho
sued in N York will carry only 8 per cent interest.

The rule of distinction is this, as to the Con-
struction and the effects it will have, the "Lex loci"
where the Contract is made is to govern: as to
the "Lex loci" and suit loci, upon the Contract
the "Lex loci" where sued is to govern. As in
Conn the Stat of Limitations, is 17 years, and in
New York 7 years. - now a Contract made in
Conn. and sued in N York, is to be governed by
this Stat of Limitations.

If a bond be given in this State to secure a
Contract made in N York the question is whether
a such bond would be usurious if 7 per cent
interest was reserved upon it? According to the
letter of the Stat. it clearly would, - but if we
let the spirit and meaning of the Stat be our
guide it is as clear on the other hand, that it
would not be usurious, and I have no doubt
but it would be so determined. Therefore a Note
may be given in Conn. reserving 7 per cent, &
not be usurious. So on the other hand a Note
given in N York, reserving 7 per cent - as if the par-
ties

27th Feb 402

D 553, 419

D 147

D 49

D 395

D 289

D 1080

D 114

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parties should just drop the line between this State
and N York. merely for the purpose of entering
into a Contract with 7 per cent interest and of
creating the Stat? it would be usurious.

There is a case of this kind; Suppose a Con-
tract be made in N York reserving 7 per cent inter-
est, and afterwards the person comes here and
renews the bond with the same rate of interest
(viz 7 per cent) is it usurious? - No it is only
a renewal of the bond, the performance is to be in
N York, the original Contract was good, and why
should he lose part of his interest by renewing
it here. It seems to be on the same principle
as the case of Robinson vs. Bland reported in
Dunbar, where two Irishmen being in England
one lent the other money, at the rate of five in
hundred, which is more than English interest; it was
held not to be usurious, and I think it was correct
tho' there is a difference of opinion about it. - The
Leg. Edict of the place can make no difference
where the performance was to be in the Country
where the interest was legal. which was the case
in "Robinson vs. Bland". Altho' the obligation was en-
tered into in England, yet the performance was
to be in Ireland, i.e. the money was to be repaid
in Ireland.

Thus is one set of cases that Courts
have recognized as, tho' they were good and lawful
where

see 5th 17.

where they were made, as where a Contract is
made in another Country, and sued upon in this,
and we have here determined that Contracts of this
kind are "made in so." (quod) "hanc" if outland
"male prohibita". It may be had Cowp. 791
of usurious money, paid either at Law or in Equity Fall. 38.

There was a rule formerly that if a man
should pay another for doing an unlawful act
and be failed, so to do, the one who paid the money
might recover it back. But as it was apparently
a good policy, late decisions have overruled it.

It seems now settled that in England when
an usurious Note is paid, the obligee may by
an action of "indebitatus assumpsit" recover the
except of interest, on the ground that the obligee
cannot in good conscience retain it. Formerly,
this could not be recovered, on the ground that the
give of money was "particeps criminis", with the
receiver, and that the Law will not take in to the
aid of persons who are attempting a breach of it.

But this rule applies only when the parties
are "in pari delicto" and they are not so consid-
ered in this case. For it is presumed that an ad-
vantage was taken of the embarrassed or distressed
condition of him who pays the money. Nothing
more however can be recovered in England than the
except of legal interest. That is just and equitable
for in conscience the obligee cannot retain the prin-
cipal.

principles and legal interests. I think when the real value of the use of money is more "per cent" than the Stat^e establishment, more might in good conscience (as it relates to the Debt^r), be retained by the Debt^r, and therefore what he might not and could not be recovered from him.

If a man includes Compound interest in a Bond or Note, by the voluntary agreement of the Obligor, it is clear that as much as Simple interest can be recovered, but is this note or bond usurious? If the Debt^r be what if more be included in the Contract than can be recovered by an action at Law, that it is usurious when the Bond or Note is so; but this is not the case if a Ballance be struck on a book account, and a Note be taken for it, here interest may be taken for this book debt, and it is not usury, tho' it cannot be recovered by Law.

48th Sep^r 1713
Do - 1710

But the test to determine whether a Contract is usurious is this, "If more be recovered in it than the Obligor ought in duty to pay, or would pay if he were punctuated in his payment" it is usury; other wise not. Therefore a Note or Bond voluntarily given is not usurious for it amounts to just the same as if the interest were annually paid, which is the Obligor's duty to do, and which if he is punctuated he will do. Yet the Law will not suffer a recovery of Compound interest, and the principle that it would be impolitic to suffer men to let their

estates

estates be thus consumed, and not on the ground of
being justly between the parties. The Contract -
must have been voluntary, not procured of the obli-
gee by means of threats of a suit, imprisonment or
for the forbearance of a debt for then it is usurious

Now the same principle if a Note be given
for simple interest but if the interest be not paid
annually for compound interest - it is not usurious
and on the same principle cannot be removed,

But a man may, by giving a Note yearly, i.e.
renewing the Note, at the end of the year and enprof-
fing the interest in it, be bound to pay compound
interest, tho' it is not usury. The ground is on the
principle of policy. For by this renewing the Note
he becomes sensible how fast his debt increases. It
is his own deliberate act; it is not usurious -

But if the original contract was to pay in
rent or interest it would be usurious. If a
greater sum than simple interest be taken for
the forbearance of money it is usury.

Suppose there are two Contracts, the one
usurious and the other not, and there is a new
Contract entered into, or a new Note given for both
is it usurious? We know the usurious one may
be avoided, but does the good one remain good?

The answer by reasoning from analogy is obvi-
ous. A man by duress gives a Note for a debt
which he in good conscience ought to pay; this
Note

35 Feb 531.
D^o 410
Cro Jac. 33
Bar. 20 57

Note may be avoided, but the original Contract remains, as good as ever it was.

35 Repl 531 If a man borrows stock in a Bank to be returned in a certain time, or else to pay the value of the stock, and its profits, this is not usurious and will be enforced tho' the stock have increased in value even so much more than the rate of legal interest from the value which it bore at the time of borrowing.

Co. J. 508 There is a rule about pleading "The Plea must set forth the principal sum and the interest: you must avow that there is a corrupt agreement. But the avowment does not surmount the plea. But so is the rule. Suppose a Plea and avowment finds "an agreement to pay more than lawful interest, tho' no corrupt agreement" - it is not usury. For mistake may happen in any way, as we have seen. "I agree" -

A liquidated sum is to draw interest from the time fixed for payment, whether interest be mentioned or not. It goes on this ground, that the C^{ts} give damages for detention in such a case, and this sum which when you go to Law and recover, is called damages, but when we speak of it we call it interest.

See the case of "Chertsey v. Janson" in "Mkins." there is much Law in that case, about usury; for this purpose I point it out.

you

You will then see the difference between Bargain and Sale. The Chancellor remarks in that place on the head of "Catching bargains." "No man cries -" "stealing fish" (i.e.), no man is bound to show the defects in his goods, or to make known how bad they are.

But this rule is now exploded. A man must make known the defects in his goods. For the maxim and long since established is "*Supplicio Veri*." is as good as "*Supplicio Falsi*."

Whenever there is too much reserve in a Contract it may be avoided in a Ct. of Law. You cannot produce the party there as a witness. They avoid such Contracts on the ground of policy. — The better way is to go to Chy. English Cts. of Equity have assumed a jurisdiction over usurious Contracts, thus far, they will on a bill being filed by the obligor take off the excrement of the Contract, the excess of legal interest. But they acting as a Ct. of Conscience, go no farther, their intention being to do justice between the parties without regard to the Stat. any farther than to let that be the standard of Conscience. In Chy. there may be an appeal to the Conscience of the Jt. It is something like calling in a witness to a Ct. of Law. But if he neglects to attend when notified to appear, he is not punished as a witness is at Law: but they take the fact "*pro Confesso*" when he does not attend, this is on the principle of equity. They never

They need relate only to do what would be considered strict justice," and so, conciliated.

In Conn. we have a Stat. giving the Chancery powers over the Equity of the Case to our Ct of Law. Therefore if it be found on a various Contract and brought into Ct at Diff. he may if he has no evidence to support a plea of usury, file a bill in Ct which will resd itself into a Ct Equity, stating the circumstances of the Case, and the Ct will not only lop off the excess of legal interest - as is the English practice but will also strike out the legal interest, allowing the obligor nothing but his principal, thus going a middle course between the ^{rules} of Law and Equity. At Ct the whole Contract would be void. In Chy, only the excess of interest would be lopped off. The oath of the petitioner is not however allowed to substantiate the fact of usury, nor is it admissible; but the respondent is called upon and put under oath concerning the fact, which if he refuse he is nonsuited in the action, at Law, in which he is Diff. —

The method of calculating Simple interest as established by the National Court, is this "Cast the interest from the principal, and apply the payments to the interest, if they exceed the interest, then apply them to reduce the principal. Computing interest for the future only, on the principal in its reduced state, if the payments fall short of the interest - apply

apply them so far as they go, and still calculate the interest from the original principal. But no interest can be computed on the interest in arrears that must stand "in factum quo." Remember this that no interest can be calculated on interest.

The mode established by the Sup^r Court in *Conr.* differs from the one above only in one particular. "When there is a payment made of interest before the end of the year, the interest which that would bear from the time of payment to the end of the year, is deducted therefrom." -

This and all as with all our State Cts. for the future conform to the national mode. These authorities relate to this head of *Usury* generally.
 2 *Str.* 1243. *Moore* 397. 544. *Cr. Ch.* 508. 257-83
D. 501-7. *Cr. Eliz.* 741. 28. 642. 588. 20. 5 *Co. Rep.* 69.
Carth. 68. 2 *Vest.* 83. 1 *D.* 38. *Conn.* 4. 1 *Sar.* 294
 2 *Mod.* 107. 2 *Burr.* 704. 891. *Cr. Jo.* 209. 1 *Sho.* 8. +
Hard. 518. 1 *Vesey* 104. 3 *Will.* 390. 250. 1 *Atk.* 301 *be*
Doug. 223. 3 *Dun.* 531. 4 *D.* 553. *Prec. Ch.* 128.

Contracts against Sound Policy.

Contracts are void not only where their unbeneficialness consists in their being "inela in se," or "intra prohibita" but also when they militate against Sound Policy; tho' they be not contrary to the Law of nature, or any positive Stat^s of the Community. Some of them may be avoided in a *Ct.*

of Law, some in a Ct of Equity only. Low Cts of Equity not being tied down by precedents, have very properly extended the principle to cases which come within the reason, of Strict Cts of Law have stopped short.

Thus all Contracts which have for their object a general restriction of Trade, in any particular way, are in Gen^l void, as agt^y national policy, one great object of which is to encourage and promote Trade, and consequently to invalidate all Contracts which have a tendency to restrain the exercise of it.

Upon the same principle every Contract that has for its object a gen^l restriction, not to exercise a Trade within a limited period of time, is likewise void. Thus if a dyer enters into an agreement, not to use his craft for two years, it will be void. So if a husbandman be bound not to sow his Land the bond is agt^y Com Law, ^{and void} ~~void~~.

But the same objection does not lie agt^y an Agent not to trade in any particular place, for the policy is not concerned in what place a man exercises his trade. Therefore it has been held that an assumpsit may be maintained on an agreement not to keep a mercers shop in N. York, for the undertaking is voluntary, and the party restrained may keep a mercers shop elsewhere notwithstanding this agreement.

But

But a Contract of the latter kind will not be binding unless entered into for good and sufficient consideration. without Consideration it will be void

2 Str 739
12th 181
Do - 242

It is best that such good or sufficient Consideration should appear on the face of the Contract, because whenever such Contract stands indifferent, and for aught that is known may be either good or bad, the Law presumes it "prima facie" bad.

Attyr 57
Rouse 108
Moore 115
Do - 242
Held 27
Do 85 - 130

If this Contract be put into a bond, you will observe that it will be different from other bonds; in other bonds you can engage into the Consideration; but here as this militates against good Policy, you may engage into it, tho' it is presumed to be void. Therefore the person with whom it is made must prove, if it does not expressly appear on the face of the Contract that there was a sufficient Consideration, or it is not binding.

And this kind of bond entered into with a view to restrain persons from exercising their trades in particular districts, are frequently entered into with Penalties. If the Penalty is contrary to the Condition of the bond, the Penalty is forfeited at Law, but Ch of Equity treat this as they do all other Penalties and in considering them advert to the object of the bond, making a distinction when the Penalty of the bond is merely intended as a security for the enjoyment of the Stipulated for and where it is in the nature of a penal damage,

Booth 419
Rouse 171

In

In the former case they consider the enjoyment of the object - the 'promissory' intent of the deed, and the 'penalty' only as accessory, and in the same age really intended to ascertain which they wish an issue to try "quantum & annuificatus," - and thereby give the same remedy upon a bond, as might have been promised, if the contract had rested upon a promised remedy.

A bond taken by a Sheriff for his fees is
 10 Mod 159 void, for the probability is that the Sheriff would
 10 B. & W. 195 make use of such bonds to support oppression
 Pleas 00-8 and if a Sheriff or Jailor takes a bond of a pris-
 10 Coke 100 oner, with condition to be a true prisoner, or to
 12 Mod 683 pay for his meat and drink, such bond is void,
 1 Bond 173 the Law prohibiting it as a means that might
 be made use of for the purposes of extortion.

An obligation entered into with an alien in
 8 B. & W. 548 every has been likewise held to be void, on the
 13 B. & W. 85 ground that a communication between sub-
 2 Rolle, 173 jects of a Country, and persons of that description
 might endanger the public safety.

The foregoing Contracts are utterly void
 Bond 08 both at Law and in Equity. So an attempt
 10 Coke 100 to deprive one self of liberty by Contract is
 7 B. & W. 610 void; therefore if a man gives a bond that he
 3 D. 893 will pay a sum of money by such a time,
 3 Cowper 729 or voluntarily commit himself to jail, the bond
 2 H. Blk 43 is void, and the Jailor would not be justified in
 1 W. & A. 349

committing kind tho' he should avoiding no Com-
mitment 'present himself for commitment: For the Law
will suffer no man to be committed by legal
process. How far this power of a man's re-
straining himself of his own liberty by going to jail
is agt. sound policy is a question. -

And for the same reason viz that they mili-
tate agt. the Gen. welfare of Society. "Marriage-
Brokerage Bonds" given for assistance in promoting
marriages are void. For marriage ought to be
encouraged and procured thro' the mediation of re-
lations, and friends; not by findlings: Such bonds
to match-makers, and marriage-procurers are of
dangerous consequence. Proving the occasion of ma-
ny very unhappy marriages. to the prejudice &
discomfort of the most-respectable families. -

And tho' the Consideration of such bonds and
sums has always been discouraged, and relief
in Equity been given agt. them, even so long since
as Ed. Courtenay's time, and long before, - Tho' the
money has been paid, by coming into Equity it
may be recovered back. You will remember
Ch. of Ch. only cut Ch. of Edw., reliev. agt. mar-
riage-brokerage Bonds -

Again a man courted a young Lady, she
would not marry without her Father's Consent, and
he must obtain it. He accordingly entered into a
bond with a third person, conditioned to pay her.

1 Ch. Rep. 87
Shannon Part
Cases - 70
1 Ch. Rep. 47
Eq. Off. 87
1 Powl. 174

1 Ves. 270

2 Ves. 588.
1 Ves. 451.

a 'pious' if he would obtain the old man's Consent
 this he did. After the marriage was consummated
 he said the Husband on his bed, but Chy. declared

Hobart 10 the bond utterly void. Contracts of this
 3 Levins 411 kind have always been held good at Law. This has
 But Chy 105. never been contradicted. so far back as Hobart's
 time

When a man Contracts to do a thing
 Cro Eliz 199 Contrary to any pretious duty of his; the Contract is
 Dyce 250? void; as a Contract of a Custom-house Officer to safe-
 10 Coke 72 for Goods to be run: - or of a Sheriff that for 10
 Do 102. the Prisoner shall escape.

Bargains made with young fellows for their
 expectations are retained ass. in Chy. (by this term
 is not meant minors for they cannot contract). -

These persons cannot actually convey the real
 property. but they may bind themselves to do it here
 after. Ch of Law do not consider these Contracts
 corrupt. but Chy have now (tho it was not former-
 ly the Case) settled that every Contract of this kind
 is intrinsically corrupt on the ground of policy:

Now 109 for it has a tendency to lead young men into extravagance
 and dissipation, to unfit them for business
 and to encourage Sharps to make bargains out of
 them.

You may see a Case where a young man
 was entitled to an Estate after his Father's death worth
 Now 109 £800 per ann. - He sold his right to it for £30 in
 hand and £20 per ann. during his Life. the estate to
 commence after his Father's death. It was first -
 but -

Got up before the Master of the Rolls; he granted a
 relief; it was then brought into Chy; but the Chancellor
 would not set it aside (this shows the principle was
 once doubted in Chy), on an appeal to the House of
 Lords the decision of the Master of the Rolls was affirmed.

You may see several cases since that where
 Chy. have set aside Contracts of this kind saying "
 they were corrupt and agst. sound policy." At Contra
bonos mores. You will observe in several of them
 that the party kept the Contract from being use-
 rious; and in one case where the money was paid
 it was ordered to be paid back.

Rel. 311
 12th Bn 110th
 3rd D. - 292
 D. - 392

This last case is said to contradict the prin-
 ciple of Chy. that when a man has performed or ex-
 ecuted a Contract Chy. will not relieve agst. it.

The case of Johnson vs Spence is Atkin. and the
 2nd Vol. 151 is cited as here this principle is laid down.

- In the case in Atkin. there were several
 circumstances attending it, that seemed to pre-
 vent the granting of relief. But there Johnson did not
 seek the bargain, Spence came to him, and it was
 completed with before a petition was made for
 relief; - these two cases then are very different cases.

Relief may be granted where a man for
 fear of going to jail he has entered into a Contract.
 You will see a case where a man had spent all
 his Estate, and went into New Gate. There had been
 a Legacy of £500 bequeathed to him, to be paid at the
 death.

death of his attacker. A Shaker went to the jail & offered him £100. - £50 now and £50 yearly till the death of the attacker at which time he would pay the remainder the young fellow agreed to it. but this Contract was set aside.

2 Mth^e 133

1 Wilton 320

1 Bro Chy - 1

2 Nov 141

1 Bro - 75

2 D^o 14. 27.

See many other Cases like the above where Chy. will grant relief. The Law seems to make no difference whether it be young fellows or not tho' they most frequently need relief.

It is said that Chy. grant relief to a particular Class of persons viz to Sailors generally who have taken prizes and sold them to Shakers, at an undervalued. They grant relief on this ground cited "because advantage may have been taken of their Situation" - and frequently fraud is practiced upon them. As a Company of Sailors have taken a prize the Ship has not arrived in port a Shaker goes to those Sailors who have arrived and offers them so much for their Shares, telling them the prizes are out, and there is very little chance of their Ships arriving safe. The Sailors agreed to his offer when the Shaker told them an absolute lie; here Chy. may relieve on the ground of Fraud.

Bro Chy 230

Hutton 53

Bro fa 152

A Contract to save another harmless for a breach of duty, or to indemnify another for doing an unlawful act is void, as to save harmless a Doctor for publishing a Libel, or an Officer for attacking -

attaching property which is ag^t Law to attach, as
 in Court a persons sheep, when he has not more
 than 20. But these cases must be distinguished from
 those where the property is in itself attachable; and
 where there is a doubt whether the property is the
 Debtors or not, here the Creditor may take the risk
 upon himself and indemnify the Offender from all
 harm if he will attack them, and this may happen
 in every days practice. An Officer is not bound to
 levy on Goods or property when he does not know
 what they are the Debtors but on being indemnified
 he may levy on Goods not belonging to the Debtor
 and when sued for so doing may recover on the
 bond of indemnity.

So there are a first this
 ignorance to keep a man in security who is factu-
 ally imprisoned another way by Contract binds him-
 self to indemnify for in both these cases the illegal-
 ity of the act was unknown to the person doing it.

As for instance a Sheriff has arrested a man
 when perhaps he has no right to do so he brings
 him along and stops at a Tavern telling the Land-
 lord to secure him till the next morning who on
 being indemnified by the Sheriff may do it. For
 the Landlord knew not that he was unlawfully ar-
 rested and detained, and on being sued for the same
 may recover of the Sheriff on the bond of indemnity.

All Contracts and agreements the object of
 which militates ag^t the principles of morality
 and

Cowper 89.

and public disrepute, as is the case with all such as are entered into to give effect to corrupt purposes, are void. As a person who wished to be made a bishop, conversing with one who had most interest at Court on the subject of a See that was then vacant, laid a bet that he would not be made bishop. Such a wagering contract (tho' innocent in itself, if unaccompanied with any sinister view) yet being a mere ^{color} ~~color~~ to disguise the real intention of the party, viz to purchase the bishopric which was an illegal act was clearly and manifestly corrupt and therefore void.

Upon the same principle a wager entered into merely to cover a bet can't be moved in an ^{action at} law. For the moment the truth appears the contract whatever shape it may assume will remain to be governed by the same rule as if the parties had expressly entered into the illicit and corrupt agreement itself.

All contracts are unlawful and void, the objects of which are to induce the commission of something the doing of which is a duty in the person with whom it is made. As if a Sheriff should make an under Sheriff, "provided that he will not send ^{over} ~~over~~ above £20 without his special warrant" this proviso, or under agreement will be void. For tho' a Sheriff may make an under Sheriff at his will, and so remove him yet

Hobbs' 12

Moore 850

Plowden 00.

yet seeing his continuance in office he can't abridge his power. So since by being made under Sheriff he is liable by Law to execute all process he can't any more than the Sheriff himself Covenant not to execute process without another special warrant - for that would be to deny or delay justice. And in such Cases the Law is the same whether the agreement be contained in a Covenant or a bond. —

Bidding at Auction
by agreement with
the owner of the
Goods so that once
the price is fixed,
and the Sale made
he is to be considered,

A wagering Contract that has a tendency to encourage an unlawful act is void. Thus if I say you a wager that you can't beat such a person, and you say you can. Such a wager will be void, because it is an incitement to a breach of peace.

Any Contract which in its object is contrary to the interest or the feelings of third persons, and thereby disturbs the peace of society, will be rejected in a Court of justice, nor will any action be maintained thereon. The Law will not permit these persons merely for the purpose of laying a wager to entice to expose others to ridicule, and libel them under the form of an action. Goodwin 129
D. 785
Rab. 282

On this ground it was held that no "paraphrase" would lie on a wager between two indifferent persons, as to the Sex of Monsieur the "Chevalier D'Or" — For altho whenever a question arises on a mere matter of right it shall be tried, notwithstanding the interest of third persons, not parties may be affected by it. Yet two indifferent persons shall not by,

a wager between themselves. imagine a third trying
 in an action on a wager whether he is a Cheat or
 impostor. nor attempt to show in such an action
 that he is a woman. and he alluded to Subpoena
 all his intimate friends and confidential agents
 to give evidence to expose him. And as ac-
 tion that is entirely tends to the introduction of
 indirect evidence will not be retained in a Ct. of
 justice, as if a wager were laid that such a per-
 son was a hermaphrodite. or had a particular
 disorder!! - as to the cause why a woman did
 not sue. - he he -

But the Ct. will not step in and en-
 force those Contracts which are agt. sound Pol-
 icy. yet if the Consideration money be paid it
 cannot be recovered, when the parties are "in
 page 321. pari delicto" unless the thing or act so be done
 Cooper 790 is yet executory the time of performance not
 Doug. 870nt.1 having arrived. But if the parties are not -
 45th equally Criminal. as where a needy person is com-
 2 B. & C. 101th pelled by extortion to pay a Consideration, tho'
 Pallot 38.41 that Payment be unpaid yet the Consideration
 For many, some or so much as is just and equitable may be recover-
 18th ed. said that ed. - as where a man wanted the benefit of a bank-
 altho' the parties rupture. here the debt must amount to such a
 were not in pari sum, and so many creditors must sign the cer-
 delicto, yet then tificate, to enable him to obtain a commission of
 could be no re bankruptcy, they could procure enough of creditors
 covery, but these
 Cases are not now
 considered as Law

wanting one to sign he "He would not sign unless they would give £50 the man had not the money himself but his sister advanced it the Commission was obtained and then an action was brought against the Creditor to whom the money had been paid for money had and received to the sister use.

So Mansfield said it was iniquitous and illegal in this Creditor taking and therefore it was said in him *Doug. 846* to detain this money. If a man makes use of *last Edition Smith v. Barclay* means in his own power to extort money from one who was in distress it was certainly illegal and oppressive and whether it was the Bankrupt's sister sister that paid the money it was the same thing *Page 189*

The taking of Money for signing a Certificate was an oppression on either the man or his family or a fraud on his creditors. It was a thing wrong in itself before any Statute provided against it by Statute 5 George 2^d chap 30 Sec 11

Persons may be concerned in an illegal Contract jointly as if two joint Merchants Contract to pay a man a sum of Money provided he will give goods which is an unlawful act and if one of them is obliged by Law to pay yet one of them does pay the sum. Can he recover a moiety thereof from his partner? No he cannot. But if it was paid with his Consent or he being privy thereto, did not object or if his assent be any way impliedly given as between them it is a good Contract. I have

4 Bury 208
3 Bury 418
2 H. Blk 374
3 Durn 418
1 Dyer 30
2 H. Blk 381
2 Willes 48
"Collins 48"
"Hauton"

remained valid. If the Contract were a good one
it revives when the security was rendered void,

There is a Law in England declaring all Con-
tracts for Annuities to be void unless the Considera-
tion be Money only; this is by Stat. and I suppose
the occasion was that advantage was taken of an
other property or goods would do for the Consideration.

There was a Case under the Stat. 1602. up before
the Ct when part of the Consideration was good, the
remainder delivered the residue of the Consideration was
paid in Cash at the time of making the grant of the
annuity. The securities were consequently set a-
side as void, the purchaser is allowed back the con-
sideration paid for the annuity, but an action of
"assumpsit" for goods sold and delivered; money paid.
laid out and expended; money had and received be he
and obtained a verdict for the whole sum, as well
for the value of the goods as the money paid, as the
Consideration of the annuity. At Subject to the
opinion of the Ct whether the Legislature meant to
make it illegal to contract for the sale of an an-
nuity for any other Consideration than that of money.

And whether if any part of the Consideration was
goods delivered. It so far tainted the transaction that
if the security were set aside, any Court ever and
as for goods sold &c.

The Ct said the Contract
was strictly legal, (the goods in this case being
all and bona fide sold) and not within the mis-
chief intended to be remedied by the Stat. or act
at this -

18th Feb 1732

See this case in

Comstock's case

Dated 20th 8

altho' the Securities were properly set aside and va-
 cated by reason of the Consideration not being duly
 stated, as it stated the Consideration was paid in
 money. And taking that to be the Case, when the
 Security was vacated the original Contract, revised
 is the Contract for the Sale of the Goods.

There arises a question whether in those States
 where there is no Stat^l agt^l gambling Contracts for
 Money, but where he at play are good? The Com
 Law must decide it. If the Contract is declared
 void, independent of the Stat^l it must be on the
 ground that he who lends money is aiding and af-
 fecting the other to lose his money. I think the
 principles of the Com Law reaches this, that the
 Securities should be considered void, as it is agt^l
 sound Policy. The Stat^l of no authority to the
 point - The reason why a man who has lost
 money won at play cannot recover it back, is
 as before mentioned that they are in "pari delicto"
 and it would be agt^l sound Policy.

By Stat^l 32 Henry 8th a Contract to Sell
 Stat^l 88 a putted title is unenforced, you are not to
 Stat^l 369 understand me that this means, when the man
 Stat^l 100 has no title, but when the title is in dispute,
 Stat^l 201 and is sold, and there is somebody in possession, claim
 Stat^l 200 ing under a different title. A sale of this kind
 is utterly void, and the Seller is liable to a penalty
 The object was to prevent selling disputed.

to prevent or put an end to litigation. The person himself should try it, and after receiving the property he may sell. Another reason is that poor men will very frequently sell for a very trifling consideration or compensation sooner than go into the Ck. The Law does not proceed with generosity whether he had a title or not. Ed Coke says there are two titles - a title of fact, and a title of right.

In those States where they have not a Statute similar to this of 32 Henry 8th it is a question whether a sale of this kind is void? -

I think this Statute is in affirmation of the Common Law. Not only the sale but also the Deed is void and the penalty may be removed. In "Moore" you will see that not only the Deed was void but also the penalty was inflicted. The object is to settle disputes, therefore a conveyance by a man out of possession to one in. was held to be not within the Statute. If the one in possession sells to another and put him in possession, he is not liable to the penalty.

Whether the Mortgagee out of possession can sell to the Mortgagor also out of possession is a question? Suppose A mortgages his Land to B. and puts him in possession. A gives B the Mortgage. when the time comes B goes to A and pays him, then as A and B have the same title can A convey the Land back to B? Some -

Some day the conveyance is void. The Stat^o must take place. It is apparent is apparent if the Mortgagee promises the mortgaged to be ousted, he will never have to make a deed and he will never have to pay the money. I say the Stat^o concerns 'pleas Real property only. Are Mortgages Land? No they are Choses in action. They will pass in a Will without Brevefrs like Personal property. Therefore the Stat^o does not operate on them. They are considered as Real property for one purpose only viz he see Vol 5th page 20.

When a Contract is made with another to do a thing lawful to be done at the time. But before performance a Law is made forbidding that thing to be done. he is then discharged as there is then an end to the Contract. If the person does

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1st Ed. 2nd Ed.
Bentley
85

the thing afterwards he will be liable. If he has paid the money it can be recovered back and an "Assumpsit" for money had and received, or his ass. He can't sue for a breach of the Contract.

Perhaps the Law has declared only part of the act to be performed void. How much he do that part which is lawful if the other requires it? A suit cannot be maintained at Law for non performance in part unlawful. But Chy. will take it up and decree a performance of that part that is not prohibited, if the other requires it.

Contracts not to marry, or not to marry a particular person are void, as ag^t Sound Policy.

policy. So if a bond be given to compel a person to marry another without there being a promise, on the other hand, it can't be enforced.

There is frequently an implied promise, & a promise may be enforced. actions may sometimes be maintained on account of the aggravating circumstances; where there is a constructed promise. The man perhaps has been a sailor in the family; letters may be shown to infer the consent, as in writing to her he speaks of it as a match agreed upon. A contract to marry is said to be binding. yet there must be an actual promise express or implied. A woman gave a man a bond of £100 to be paid on condition that she ever married, and he gave her a similar bond, that in case she never would marry he would pay the amount of the bond: it was a sort of wagering contract. She (I suppose wishing to marry), applied to the Chancellor and he set it aside.

A entered into an obligation with B, to pay her £1000, on condition that he married any other person than herself; she brought an action against him, but could not maintain it. you will observe he did not promise to marry her, and there fore there was no breach of the obligation on which to found the action as long as he never married any one, and he was still single

See a.

See a case of an agreement to marry, a particular
 person, or pay a certain sum: the obligation was
 2d ed. 102 not binding, as there was not a mutual promise
 page. 340
 485 no reciprocity, the covenant was void,

See a case in "Atkins 287" where a covenant
 was entered into like the above, and it is there so
 2d ed. 287, held to be binding, tho' there was no mutual
 promise. This is opposed to the course of author-
 ity, and I say, it is wrongly reported, as appears in
 the same case in "2 Eg. Ch. 245," where it
 2d ed. 245 is stated on different grounds, it is then laid
 down that there was a reciprocal agreement,
 2d ed. 540 See another case which goes all the length of the rule.

There is also a case where the doctrine
 is established beyond all doubt. The bond was
 10th ed. 434 declared not to be binding, because there was
 not a mutual promise. The promise may
 sometimes be inferred, as I remarked, but when
 you are writing you must depend on the writ-
 ing alone, you can't resort to inferences.

Upon the same principles of policy, Con-
 tracts to procure Offices (not to sell) are void.
 3d ed. 391 I see an engaging other for a certain sum to pro-
 cure an Office for you. Relief is granted in Ch.
 144 agt. such Contracts. But it does not follow that
 because the Court is so, you cannot
 recover at Law. I think such Contracts, void at Law.
 Ch.

Courts have determined that in this case money paid should be refunded; it is different from the cases where money is paid on a contract, chiefly referred to Law; the Law in such cases will not assist the persons breaking it; they are in "in pari delicto".

Amblor 432

4 Vesey, 811

see page 312

314

In Genl. Offices cannot be sold. It is a rule that a man holding a judicial Office cannot sell it; and the rule is the same when a ministerial Office is held by appointment; it cannot be sold.

But if these ministerial Offices are in *Don* heritable, they may be sold. The distinction then

is, if the Office be an *Exco.* it may be sold, otherwise not. Not a judicial Office is not an estate, and I have already remarked if a man is appointed to a ministerial it cannot be sold.

Vol. 1. 249.

Every man is chosen or appointed by authority to Office in this Country. No Offices are hereditary in this Country; they are not inheritable.

If a ministerial Office be given to another for Life, he may assign it for that time.

To this rule of selling Offices there is in England an exception, and that is selling Offices in the Army. I don't know on what principle this exception is founded; but so the Law is. There is no such Law in America.

A Contract to procure an Office in the Army is void.

2 Vesey 308

1 Vesey 327

You may see the Case of a married person in

in the Dock-yard, - this would seem like an Office

In England a Pension is given to any person who becomes Superannuated after remaining Master-joined in the Dock-yard for such a time. This master-joined entered into a Contract with the Foreman of the yard. (who is always appointed in the place of the Master-joined when he leaves it) that if he (the Foreman) would agree to pay a certain Sum he would pretend to be Superannuated; he agrees to it and the Master-joined is declared to be Superannuated and the Foreman took the place; and the Master-joined demanded the Money of him; he refused - And on application to the Ct. they declared the Contract void, as it was agst. Sound Policy.

88 Rep. 90. The Sale of the Command of an E India Ship is void

All Bonds given to keep Mistresses on Con-
23 Ann 1558. dition of future Cohabitation are void both
9 May 1794 in Law and in Equity because they are illegal
1 Selwyn 560, and agst. Sound Policy.

The rule formerly was that bonds given for
23. Mk. 333 past Cohabitation with kept-Mistresses if then
D. - 538 had been law-women and kept previous to
14 Ann 483 such Cohabitation were void: but if the person
22 D. 187 giving the bond had seduced them the bond was
D. - 242 good.
Amble 641 good

But this distinction is of late years
Falkoff 153. come away. How any person can say that a
Piercy 114 bond given voluntarily either to a good woman or

a bad woman, an honest maid, or a thief is void. Cousper 742
 I know not. There is no difference to whom it is 5 Viny. 291
 given. If a man had paid this money, how. — D^c 280
 Could he get it back? He gave the bond voluntarily, and it is binding on every person except it tends to defraud Creditors.

There have been some decisions where a voluntary bond is not good. This not contradicting the decisions above. It was on account of the enormity or aggravation of the offence. But I think Chy. would hardly set aside these Contracts now after the numerous decisions above mentioned. where the circumstances are nearly the same.

The last Case is this. A young woman, of good Character came to live in the Family of A — knowing that he was a married man, was seduced by him, and caused a Separation from his Wife. A has given her a Grant or a bond. — But Chy. is unwilling to set it for payment. The Chancellor 2 Viny. Chy.
 said "Where a young woman appearing to be married before, is seduced to by a man and submits to his temptations. He does a great injury, but she knows the Crime she submits to is not so great as adultery, and she may be inclined to suppose he will marry her, and there are often such promises as it is impossible to give evidence of. if the parties are both single there is room for presumption thereof; and if what happened the subsequent 100-0
 was —"

marriage takes off the enormity of the crime committed before, and in most Countries legitimates the issue. And besides in such Cases people know they are doing what which is not of so bad a consequence to families.

Whereas when a man takes and keeps a mistress upon the name of his Wife (which is the case above) who themselves leaves her husband, that is such a crime as stains every one in the land. he therefore would the bill be dismissed. Had she not known that he was a married man; as if the Wife were at a distance or if any imputation was proved on her, it would be a difficult thing.

Another where a woman married a man that had a wife, she not knowing it, it was afterwards discovered that he had a second wife; she man gave the second wife a bond for £1000 to continue to live with him. The Ct. on application for a bill to enforce payment, returned that as the bond was given after she knew the first wife was living, and to induce her to continue with him, it was void that a voluntary bond it must be postponed to all the Simple Contract debts. If this bond had been given to the second wife for the injury done her, and therefore she had left him, it would have been good as a Quia in Praejudicium and would be paid before any Simple Contract debts.

Cw-

On this subject there have been some opinions
expressed, that Ch^y ought not to interfere in any
of these cases, as they are void at Law. But I think 5 Nov. 294
after the many Similar Cases, Ch^y may interfere 30th - 308,
see here. The reason is the same. The opinions
of McDonald and Ed Rosby are that Ch^y ought
not to interfere. But see a case since that * Wed. 19,
time when Ed Rosby is of a different opinion. -

Mode of relief against illegal Contracts.

When a Contract lies in part. It must always be
sustained upon as it is, for the facts proved must sup-
port the declaration. Thus when a part ille-
gal Contract is declared upon the illegality will ap-
pear upon the declaration; of course the prop-
er mode of taking advantage thereof will be by
"demurrer." So if the Contract be in part existing
if it be recited at length on the instrument the
illegality must also appear on the face of the de-
claration; and whenever that is the case, it must
be taken advantage of by "demurrer." But
if the mispart be thrown behind the curtain
the Contract appearing valid on the face of it the
declaration will likewise appear so; therefore no
thing appears upon record that will support
the demurrer. But the Def^t must aver Wilson 34
the corruption by means specially and what
be the nature of the Contract tho' it be stated he will
be allowed to substantiate that a contract by part
Safford.

Suppose a corrupt bond be given, but which appears valid on the face of it the defense must be as stated above. But if there be a condition annexed to that bond, showing its illegality tho' the Plff. will outlaw on only the bond yet the Deft. may plead over of the Condition annexed to the declaration, and upon demurring to it is considered as apart of the declaration, the stipulation then appears upon the declaration and it may be taken advantage of by demurring, or the plea may be "unlawful", generally.

The mode of defense is also the same in impossible, only that where there is an impossible Condition annexed to a bond, the Law is (tho' I think not well founded) that the Consideration is void, therefore no advantage can be taken of it as before said.

Of the Consideration necessary to Support a Contract or Agreement.

1. *Black 330* Some Consideration is necessary to every Contract, to make it binding; but that Consideration need not be of any Particular value; a pepper Corn or a pint of Wine is sufficient in Law. — That is a Consideration is necessary to every executory Contract. But there is no necessity of one to a Contract executed. If there is no Consideration mentioned and there was one, you may aver it, but you can't aver any thing that does not

not stand well with the writing.

If a Contract be detailed at length, and no Consideration appears. It is a "nudum pactum" - as if a man Contracts to quit a house, and there appears no Consideration.

A Contract for a good Consideration is not good against Creditors. See 1 Eq. Off. to 84 Willk's 152 Vol 5th 204 Lawes. 61

Tho' in England if such detailed Contract have a Seal affixed. Such Seal is said to imply a Consideration, and is therefore binding, on the oath of which however if it be made to appear that there was no Consideration nominal damages only will be given, and Ch of Equity will not carry them into execution. You can't prove by Parol any thing that contradicts the Sealed instrument. But if you can prove by another Sealed instrument that there was no Consideration, it may be avoided.

In Cases of Securities for Money where the Contract is not detailed at length as Bonds, Notes &c. tho' no Consideration appears on the written instrument it is binding unless it be shewn that in fact there was no Consideration. To prove which Parol Proof is not admissible. But a writing between the parties, may be admitted to prove the fact. There is much Confusion in the Books respecting this Consideration. The true Proposition is "That no executory Contract is good for any thing, without a Consideration."

So that a Parol Contract must shew the Consideration upon the face of it, and if it be such an one as the Law does not recognize, the Contract

Contract will be good for nothing.

If there be a written one without mentioning a consideration, it is "prima facie" bad, you may introduce parol & proof to give effect to the writing tho' the Consideration be not mentioned.

But when the Contract does mention a Consideration, you cannot introduce parol & proof to prove that there was none. Parol & proof that is admissible, must be such as will stand well with the instrument. Remember this principle, it is confined to executory Contracts alone.

When a Contract is executed, the Consideration can never be enquired into as between the parties; but it may be by third persons who are interested, as Creditors. As I suppose a man owes a debt of £5 and the only property he has is a horse, and he gives him away: the Creditor may enquire into the Consideration of this, and attach this horse in the donor's hands. But representations can't enquire into the Consideration neither can third persons unless interested.

Some Considerations are said to be good, and others valuable. A valuable one is - marriage work done, Money, or property called a pecuniary interest: and every executory Contract founded on such Consideration is binding.

A Good Consideration is such as that of blood or natural affection, between near relations.

3 Co. 83,

12 Mod. 482

2 B. & C. 297

3 Co. 83,

18 Mod. 427

12 Mod. 301.

the satisfaction arising from which the Law
treats as equivalent. For whatever benefit may
move from one near relation to another. And
a Contract on such Consideration entitles the
promisee to the thing Contracted for, if the Con-
tract be executed. tho it will not be binding as
agst Creditors.

3D Ann 232
D° --- 339.
1 Eq Off 84
2 Ld. 157-
9 East -
233 Binn.

When the Consideration is only a good one,
as love or affection, if the Contract is executory,
the promisor is not bound by his promise; if
executed he is, tho it is often enforced in Equity, not at Law.

Cro Eliz 337
Cro Jac 397
2D Ann 170
1 Kymon 427
1 Domes
1 Kym 427.

In executory Contracts, where a man
promises in any ordinary or trifling matter,
merely promises. Without a Consideration it cannot
be enforced, either at Law or in Equity. But if
he makes an executory promise to do an act (as
to convey Land) on sufficient Consideration it is
binding and may be enforced.

2D Ann 170.
3 Coke 83
1 Domes 335

Contracts are said to be Special and Simple

1 Salt 129

A Special is one in writing sealed.

1 Ponts 320

A Simple one is in parol or in writing not

D° 335

sealed. A parol Contract without Consideration

2 Ray 909

is a "nudum pactum". A promissory Note

5 D. 143

if negotiable if it had no Consideration, but if once

Dough 514

negotiated, it can never be attacked or enquired into

Ches 155

This is the rule at C. L.

4 Allod 242

It has been said that there is a rule laid down

1 Lupt 574

which says a written Contract is good without a

2 D. 302

Consideration, but no authority is to be found to

3 D. 77

36 D. 351

* Burr 1070 warrant that saying. The authority alluded to
 will not support a very such thing. The Case
 before the Ct was about a mercantile instrument
 and many of those are good without consideration.
 Lawd - 462 The Opinion of the Ct (which must be taken ac-
 cording to the subject matter before them) was good
 in Case of a mercantile instrument, but not so
 as to Com Law Cases.

I before observed that before a Note of
 hand is negotiable the Consideration may be in-
 quired into. But not after negotiation. The Promise
 then cannot ever want of Consideration. It would
 tend to cheat innocent third persons. "bona fide"
 holders. A Consideration is well pay to
 a Sealed instrument or Specially, tho' the prom-
 isee need not prove it. - the Sealing is a Con-
 sideration; and the instrument is binding unless
 the want of Consideration appears on the face of it
 or by a written Sealed instrument. A Parol
 Contract that has no Consideration, when said on
 may be demurred to. If one bring an action
 on a Parol Contract without Consideration he
 must so support the action even a Considera-
 tion and that must be proved. Every ex-
 press Contract must have a Consideration.*
 As long as a Note of hand is confined to the
 hands of the persons who fabricated it, the want of
 Consideration is a clear bar to the moving any
 thing upon it on the ground that it is a "nudum pactum".

1 Burr 332
 Plowden 308
 D - 434
 1 Pont 334
 Head 200
 1860 334
 20 Ray 724
 D - 1550
 25 Cr 572
 3 D 438
 7 D 477
 3 Burr 1087
 25 Cr 577
 7 Cr 40
 1 Burr 308

* See a Contract
 not binding
 2 Cr 445
 which is not a contract
 1 Cr 335
 2 Cr 342
 4 Cr 333
 1 Burr 341
 5 Cr 121
 151
 32 431 787
 33 274

The rule then "that there must be a consideration to every executory Contract" is strictly true - But an executed Contract is good without a Consideration as between the Parties tho' not agt. Creditors.

Paine 238
Doug 514.20
Exp. D. 577.
Hug 955.
D. 074

Anything that is an advantage to the Promisee is a Consideration. And any thing however trifling to be done by the P. will be a Consideration sufficient to ground an action II

Paine 342
Fenth 334
Cro. Eliz. 87.
D. 180
Cro. Ch. 70
Dye. 272
How 31st. 31.

A Consideration may arise or be created by doing or permitting something to be done to the promisee or loss of one of the parties. No matter whether the Consideration for a Contract imports any gain to him that makes it, or not if the party in whose favour it is made forgoes any benefit or advantage which he might otherwise have taken or had, it is a sufficient Consideration II

II
Paine 344
Hobart 4.5
D. 210
Cro. Ja. 342
Cro. Eliz. 83
D. 74
D. 349. 881
Comper 128.
D. 2904

In order to give effect to a Contract no matter how small the Consideration is, as a pepper Corn, it is said is sufficient. tho' an equivalent Consideration might make the Contract appear more just and undispicious. Trifling and insignificant Considerations are looked upon as none at all.

54 Rep. 373
Cro. Eliz. 87.
D. 150.
2 B. 23.
2 Paine 152

Thus if a man be arrested upon a void arrest and another in Consideration of setting him at liberty promises to pay the debt; if the arrest be unlawful the Consideration is not good. If and suppose A has a lease at Will and B in Consideration that A will grant his Lease Covenants to convey a certain

Winn 213
Paine 355
Wilson 230
2 Ser. 518
Exp. D. 94
Cro. Eliz. 200.

certained Property. this is an old Consideration.
 It might have been ruined off any moment and
 as soon as he left the Property the Deed was at
 an end. he had nothing therefore to convey or grant

If a Consideration is executed and does not go
 along with the Contract. but is entirely past and
 Lawes 65, the Contract is merely subsequent. it is not a
 Powell 348 sufficient Consideration to ground a Contract on
 1 Dyce 272 unless something arises between the parties that is
 Pleasden 5 meritorious. As where a Master promised two
 D^r - 302 men that in Consideration that they had bailed
 Coe Eliz 442 his servants he would save them harmless; it
 1 Hollitt 11 was held that this did not bind him because he
 1 Esp Dig 87 had no benefit nor they prejudice by his promise
 D^r - 95 The Consideration was perfectly past, the Contract
 2 Leon 225 could not be binding. The Law in such cases
 2 Brest 73 goes on the footing that there was no Consideration
 Coe Eliz 741 The man was under no legal obligation; was he
 D^r - 885 under a prior moral obligation? It is diffi-
 1 Esp Dig 45 cult to say he was, unless some persons in the
 same Situation might have felt themselves bound
 in honor by such a promise. whether it be so or not
 is yet questionable
 If a person makes a promise on a Consider-
 ation. executed and past and be not bound by a pri-
 or legal or moral obligation. or by duty at the time
 he will not be bound by that promise. But his
 Contract on a Consideration executed and past
 would

2 Brest 73
 3 Brest 90
 1 Coe Eliz 409
 1 Coe Eliz 94
 Powell 350
 1 Leon 198
 D^r - 409
 1 Brest 413
 1 Brest 255
 1 Coe Eliz 138

would be good if there was a duty to pay - A man's
son died in the West Indies, a friend of his buried
him according to his rank in life and enclosed in
a promissit that he had at his own charges buried
the Deft's Child. The Deft. promised to pay him his
charges. Jury was given for the Deft. and yet the
consideration was past. But by Stat. 43rd of
Elizabeth the Father was bound to bury his Child
and therefore there was an indebtedness which sup-
ported an "indebitatus assumpsit."

And tho' there was no prior legal obligation
if the thing be founded upon a prior moral obligation
now, as a promise or contract to pay a debt - just
tho' bound by the Stat. of Simulations this will not
be a "nudum pactum," but the promise will be
binding. And when a man promises to pay for
the nursing of his illegitimate Child there was no
indebtedness, but it was held that there was a pri-
or moral obligation, and that therefore the prom-
ise was binding.

At Com Law past Considerations were not
binding. Thus if a man did a voluntary act for
another, who after the act was done promised to
pay him for it. Such promise was not held binding.

But the Law as now settled seems to be that
if a man voluntarily does a beneficial act for me
(as if he gets my horse out of the river or mire and
thus saves his life) he can recover nothing of me for
act. But if I afterwards promise to pay him for it
such

Salva.

But the moral
obligation is good
as a good considera-
tion, and the man
who has been bound
to do so, and who
has promised to
do so, is bound to
do so.

See in 2
East 505.

The Day 259
Pawb 331

Port 330

Co. L. 290

Co. L. 95

Co. L. 147

Co. L. 445

Co. L. 127

Co. L. 94

Co. L. 934

Co. L. 928

2 East 500

2 East 58

Vol 3rd 17

Willeo 11

2 Stry 718

Kent's 318 Such promise is binding upon me But if
 332 such voluntary act be performed for a third person
 336 and I afterwards promise to pay the performer -
 343
 353 such promise will not bind me

2 Kent's 288 And a past consideration will be a good ground
 289 to maintain an action on a subsequent promise or
 292 contract where the consideration is stated to have
 294 been at the Deft's special suit and request -
 300 For the promise tho' it follows is not made, but
 301 coupled itself with the request to pay, and the mere
 302 promise of the party, procured by that suit. E.C. who'd
 303 promised to pay £10 for that W.R. was said
 304 for any servant - is not good. Yet a promise to pay
 305 £10 for that he was to do for him at my request is
 306 good. 05-0 good
 307

But when a person does a beneficial act
 for another in his ordinary kind of business, who
 without a request, as when a porter carries goods
 delivered him by the boatman, it will support an
 action, without any subsequent promise of the
 owner to pay him therefor; - on the principle that
 the boatman was agent for the owner.

Where there was a sufficient consideration can
 any other than the promisor maintain an action
 upon it? A mere stranger to a meritorious
 act done to a third person, cannot thereupon found
 on a promise applicable to him; - and the general
 rule was that no other than the promisor could
 maintain an action.

There has been a departure from this rule viz
that the necessity of relations was sufficient for
them to maintain an action of trespass - But
To be no reason why it should stop at relations, even
when relations might it has been in cases of land-
ship. & no other than relations have & are thus
permitted. I think the principle must be found
ed in necessity, and not on relations ship, and where
ever that necessity arises. I think an action may be
maintained, (or sustained)

I know it has been said that we can find no
 cases in the Books. where a bond could be sued by
 any other than the obligor. True. It has how-
 ever been determined by the Chief Justice of MS,
 in Vermont, that it might. It was a very in-
 portant case, and it was allowed on the princi-
 ple of necessity. The "Cedric que trust" was
 allowed to sue the bond. If the Trustee will
 not sue you may compel him in Chy to lend
 his name, now being indemnified. But in the case
 above the Father was a Bankrupt.

Where there is an undertaking and promise to pay, a debt which debt is superior to the promisor, we are told that an action may be maintained on the promise if there be sufficient consideration. The real ground then is "that it might be supported otherwise." You don't move the Act on that promise; on the suit for, because you must not suppose that he received the debt.

Wm

1 Bowl 353-5
 Cyo & Co 200
 D^o 19 455
 Hards 73
 3 Salt 96
 C^o Dig 45
 * But you never
 as the famous
 Consideration per-
 haps I can be the
 you may have
 the 1000 pounds
 And +

And of this nature
are all the prom-
ises for forbear-
ance. The promise
forbearance for a def-
inite consideration
is not a promise
that is not a promise.

East Dist 95
Ex Chy 200
3214, 455.

Salk 90
Hart 73
Paw 334

When the forbearance of a suit is the consideration of an "assumpsit" or a promise two things must be observed. First, The forbearance must be for a particular time certain not uncertain. Secondly, it must be from a suit or matter in which the Debt is chargeable. Thus upon an action on the case for a promise, setting forth that the Debt was due and indebted to the Plaintiff and that the Debt being his other promise is that if the Plaintiff would forbear to sue for his debt she would pay it. This was adjudged to be no consideration. Because the Plaintiff had no prejudice by such forbearance, and she was not liable to an action. There was neither a prior legal nor a moral obligation.

A new reported says all the Cases stand on this ground. If the original promise was a void one, she was not bound; if it was a voidable one, she may be bound. It does not, on the ground of a moral obligation; it depends on other footing whether there was any consideration for a contract that is void has no consideration.

I say the rule is as broad as the last it says. But I enquire if there was a prior legal or moral obligation tho' past and gone, she would have been bound by it. If no time of forbearance be fixed there is no consideration. So a promise to pay a debt for which a person is not liable, or where one is unjustly arrested and

East Dist 94
Hart 72
Salk 742

promise -

promises to pay, the promise is void. there was no consideration. Hobart 18.
Powell 357

But a promise for forbearing a suit is good, if there was a real ground on which the suit was founded. And it is sufficient if there be a colour for founding the suit. And such case forbearance is a good consideration, as where an Infant bought velvet and silk and said, the mother came to his wife being his mother, and said if she would not pay him, he would sue her, and the wife's promise in consideration of forbearance to pay him, - this was held to be a good consideration, on the ground of a colour for a suit, the being executrix. Powell 350
Salk 142
Dyer 272
D. - 231
- note -

When the day given is the consideration it need not be set forth how the debt arose. - Powell 357
When you wish to get rid of a promise for forbearance, it must appear on the face of it that there was no consideration. you can't enquire into the justness of the consideration. The original debt is acknowledged in the promise. Hobart 18.

In executory contracts of the agreement that what one shall do and act, and for the doing thereof the other shall pay, be so that the considerations are mutual. The doing of the act is a condition precedent to the payment and the party who is to pay, will not be compelled to part with his money till the thing be performed. Wheat 177
D. - 214
3 Salk 95
156 Bk 274
7 Coke 10
7 Bk 461
1 Salk 112
156 Bk 380
Dyer 239
Powell 357

And

And the other party, before he can recover, must
 aver that he has done the act. Sometimes the
 Contract is so made that it is difficult to ascer-
 tain which should perform his part first.

As suppose a man promises to pay me £200
 if I will transfer him such stock, and I promise
 is that if he will pay me £200, I will transfer
 him the stock, - here the acts to be done are

Lawes. 113 Concurrent. In this last case before I can re-
 cover I must aver that I have done or am ready
 to do my part, and if the other sues me, he must
 aver that he has paid me or is ready to pay.

The above rule admits of these diversities "N.B."

1. *Agg't* 382
 2. *Agg't* 384
 3. *Agg't* 562
 4. *Agg't* 147

1. *Agg't* 319
 2. *Agg't* 237
 3. *Agg't* 358
 4. *Agg't* 171

1. *Agg't* 42
 2. *Agg't* 130
 3. *Agg't* 106

1. *Agg't* 113
 2. *Agg't* 113
 3. *Agg't* 113
 4. *Agg't* 113

1. *Agg't* 113
 2. *Agg't* 113
 3. *Agg't* 113
 4. *Agg't* 113

1. *Agg't* 113
 2. *Agg't* 113
 3. *Agg't* 113
 4. *Agg't* 113

1. *Agg't* 113
 2. *Agg't* 113
 3. *Agg't* 113
 4. *Agg't* 113

1st If a day be appointed for the payment of
 the money, and the day is to happen before the
 thing can be performed, an action may be bro,
 for the money, before the thing is done: - if he
 afterwards does not perform the act an action
 may be bro, agt. him.

2^d When a day of payment is appointed &
 that day is to happen subsequent to the per-
 formance of the thing to be done by the Con-
 tract, such performance is a condition pre-
 cedent, and must be averred in ^{an} action for the
 money; - and he may maintain an action for
 non-performance before the time of payment

3^d But if another is considered that I
 promise to do such a thing promise to do another

another thing for me, or pay me money at such
 a day. here neither of us need aver that we have
 done what we promised. but either may have
 an action agt. the other for not performing his
 promise. because the consideration and forma-
 tion of his promise to me, was the promise I
 made to him. And it is a good rule when
 the Deft has a remedy for the consideration of a
 promise, that consideration need not be averred
 to be performed. As if in consideration that A
 promises to deliver me a Cow to my use, B
 promises to deliver A. \$50. here B may bring
 his action without averring the delivery of the
 Cow. I think it would have to be averred to
 have said that actions could not be main-
 tained, on the mutual promise till the
 party had performed

I think many of these contracts which are
 said to be mutual promises were not so entered
 by the parties. You may see a case where
 the D^f pleaded very strongly agt. a mutual prom-
 ise: - they wished to avoid it.

When a contract is made and it is
 not necessary to aver a performance to main-
 tain an action at Law. if you go to Equity you
 never can recover till you have performed -
 what you agreed to.

Suppose as has been entered that a
 promise

Laws 110
 Kent 177
 D^o - 214
 Hobart 88
 Head 102
 1 Talc 24
 5 Moo 411
 1 Leys 293
 3 Ball 187
 2 Turner 35
 1 Galt 383
 This case ruled -
 does not prevail
 in a Ct of Equity
 Laws 111-12

*
 48 Rep 761

1 Fort 383
 1 Bro P 184

1 Powl 300

1 Salk 21

Hobart 88.

+ as the contract

must be of such

a kind as to be

both to both

but it does not

mean that each may

be bound or neither

See Salk 1st page 217

4th 2 = 320 48.5

from Salk 133

2d Ray 909

C. J. 507

1 Salk 21

5 Salk 143

3 Salk - 11

1 Powl 302

1 Salk 10.3

1 C. J. 24

14 Salk 450,

1 Salk 10

2 Salk 152

2 Salk 253

2 Salk 284

1 Salk + 4

1 Powl 368.

1 Salk 40.

1 Salk 253

Moore 885

promise of a child to many is void (tho' I don't
say it is) if a promise were made by a female
adult in return the promise would not be bind-
ing; there would be no consideration. Where a
Contract has no consideration it is void; a
"nudum pactum" Mutual promises must
be both binding, as well as the one side as the
other, and must be both made at the same
time; or else they will be both, "nudum pactum" -

The mere act of entrusting property to another
to do something with it, is a sufficient considera-
tion for his faithful discharge of the trust.

If an agreement be made to save the
honor and reputation of a family; a Ct of Eq^t
willing to lay hold of any just ground to uphold
it will consider the establishment of the peace
of a family as a good consideration.

To all compromises of a doubtful right
are a sufficient consideration for, and founda-
tion of an agreement

A consideration need not be express; if
it appears any where on the face of the instru-
ment it is sufficient. The words of a Con-
tract may show a consideration, which on anal-
ysis may appear totally void of a considera-
tion. As where a widow who was entitled to the
administration gave money that she might be ap-
-
ap-

appointed. — Such Contracts are not valid

When a Contract is in all sides executory, it may be rescinded by mutual consent & agreement. but when it is in any part executed, when a Consideration or writing, is necessary, so a valid remuneration.

Co. Ja. 820.
Co. La. 384
2 Mo. 44.
See page 40
485.

To make a good Deed to Convey Land it is said to be absolutely necessary that there be a Consideration of some kind expressed therein; otherwise it enures to the use of the Grantor; and the Court of Equity will Compel the Grantee to let the Grantor take the use and profits of the Land to himself tho' the Grantee has the legal title to the Land.

Deenard 170
Moule 504
Do — 570
Co. Ja. 819
Paine 308.

This rule when first established, grew out of the circumstances of the times, during the ward between the houses of York and Lancaster. And from the practice which then times introduced the opinion arose that whenever an Estate was granted without any Consideration, or a reason for it, it must enure to the use of the Grantor. But that rule cannot apply in this Country, or any other, where the reasons do not exist. And there is no reason why that this day an Estate has been conveyed away without any Consideration, that Conveyance should not be upheld as a conveyance of a personal Chattel; — and therefore I think the Principle is universal that a Consideration is not necessary when the Contract is executed.

see 5th 204

In, written.

In written Contracts the Consideration is only evidenced of the nature, not of the quantum, of Consideration. Remember that the quantum may be enquired into if it be necessary; and any Contract may be enquired into as to amount of its necessity. If the Contract be illegal it can never be enforced by any subsequent promise at all.

V Fifthly Of Contracts obtained by the tortious act of one of the Parties.

- This may be divided into four distinct heads & viz.
- 1st Where there has been actual imposition or fraud.
 - 2nd Where fraud is apparent from the nature or subject of the bargain.
 - 3rd Where advantage has been taken of the circumstances of the Parties.
 - 4th Where fraud has been practised on third persons.

10 Binn 391
D. 390.474
D. 482
2 Binn 149
Doug. 434

The first kind are redressed ag^t. Sometimes in Law sometimes in Equity only, and sometimes in either.

11 Binn 497.

If the Party be imposed upon and executes the Contract while he supposes he is executing another. It is called a fraud in the execution of a Contract and the Contract is wholly void both in Law and Equity. When said upon it he may plead, "non est factum." This remedy is by Law. If he be not said upon it, Equity will interfere and compel the delivery up of the instrument. The power of Ch^{ty} is so great the specified relief that cannot be obtained at Law, and where fraud is proved.

20 Binn 304
2 Binn 594
11 Coke 27
2 D. 3. 9

unpo-

admissible. it does not contradict the writing.
 For the the writing is admitted to be true and thus
 but the fraud is which is complained of. and it
 may be proved by parol. If the fraud be in
 the consideration. & or where one is imposed on con-
 cerning the thing he received. that is done. that he
 is not received. or that is to be done. as the Consider-
 ation of the Contract into which he enters: it is 2d Wm 203
 the generally received opinion. that it can be re- 2d 290
 lieved agt only in Cts of Equity. This distinction
 is considered absurd and capricious. and in Court
 is abrogated. Fraud in the Consideration is de-
 nied by Chy. There is a great difference where
 the fraud is in a Contract Real and in a Con-
 tract Personal. At Court Law you can
 avoid a Note obtained by fraud. but you recover
 a compensation in damages. There is an in sup page 257 *
 convenience in this. the man may sue you
 on the Note and recover. and before you can sue
 and recover from him a compensation in damages
 for the fraud. he may become a bankrupt and
 you lose the damages. I think it would
 be perfectly right to plead fraud to a Note in the
 first instance. and thus make a Set-off. and
 for the reason just given. in many Cases Com-
 mitted justice could not be done. in any other
 way. than allowing a plea of fraud as a set off
 to any such note obtained by fraud.

Th.

Authorities
Sabra

In *Comm* a piece of fraud is allowed to avoid the obligation. Chy. may be said when applied to void where Notes to be set aside: but it cannot be done at *Comm* Law. I can see no difference between this case and where a bond is obtained by duress, which may be avoided at *Comm* Law, and why not on the same principle one obtained by fraud? But *Comm* Law is otherwise.

If a Contract concerning Real property is fraudulent, no application to Chy. they will wholly rescind it. So in certain cases where the Contract is of Personality, as I mentioned above, they will wholly rescind it by way of Equity when it is apprehended or actually, the case that the fraudulent person is in a state of bankruptcy, provided he has not passed the property obtained by fraud to a third person, a bona fide purchaser.

But I shall contend that Contracts obtained by a partial fraud stand on the same principle, and that they in both cases ought to be wholly rescinded. But the rule is that where the fraud is partial the remedy ought to be in damages to be obtained in a *Co* of Law. Agreeable to the "*Lex Mercatoria*", any, even a partial fraud wholly vitiates a Contract, so that it may be avoided in a *Co* of Law.

38th Feb 438
Q^o - 433

If the fraud be in the consideration of a Contract it has been held that it is good at Law.
But

But in England lately Cts of Law have set aside
such Contracts. When there is a particular fraud in
the Consideration, which cannot be cured at law as Cts of Law
relief may be obtained in Ch. And an action
of Fraud lies as soon as the fraud is discovered. It is
common where the party procuring the Fraud is
able to pay to give him value but this is not ne-
cessary.

Of Cheating. A man may cheat an-
other by selling him property which is not his
own. The Vendor remedies this in damages for the
fraud. If he Vendor innocently sold the property
thinking he had the title he is liable on a
pled warranty raised by Law in all such cases
that the Vendor is the owner.

Of Warranties. Where a man warrants
what he sells he will be liable whether a fraud
is alleged or not an action may be founded on the
Contract if the property proves defective. And if the
party knew of the defect when he warranted there-
in damages may be recovered for the fraud.

But a warranty must be made at the time
of the sale. To support the Vendor to an action thereon

It had been before and was the inducement
to the bargain an action could not be support-
ed on the warranty. But an action might be
supported on the affirmation for cheating.
For the previous warranty was the inducement to the bargain.

Cro Jac 1474
2d Ray 543
13 Rep 581
Exp Dig 581

156 Bk 17
Doug 20
156 Bk 373
Exp Dig 629
1 Selwyn 685
D. 686

Styl 414
1 Cornish 11
12 East 20
1 Selwyn 688

11th Ed. 17. In an express warranty, it is not necessary to
 Doug. 8 20 prove that the purchaser knew of the defect to maintain
 18th Ed. 109, 2, 3 the action.
 18th Ed. 1029. *Baron the action.*

18th Ed. 1088. It is not necessary to give notice now to return

11th Ed. 17. the property to maintain an action on the ground
 18th Ed. 1088 at of fraud: the compensation is in damages. I
 doubt the correctness of this principle. I think the
 property should be returned, and the contract annulled.

Suppose (e.g.) a man wishes to purchase a complete riding horse, and that the seller tells him his horse was one of that description, and he gives £100. The purchaser then finds him old and worn out, fit only to plow, and worth about £40. Here the contract should be declared void and the horse returned. But the law is otherwise.

In *Conn* the old law, if there is clear unaltered fraud, the contract is void (e.g., a man purchases property with counterfeit money, knowing it to be such: the contract is void, for here the fraud is pure and clear, pure and unaltered).

When a man cheats you out of money, you may get it back by indebitatus assumpsit. But if he cheats you of any thing except money, you can bring an action.

3d Ed. 30. When a person is subjected on a false
 11th Ed. 1088 warranty, his liability arises from contract. But
 Doug. 1032 when one is subjected on the ground of false representation

a affirmation. his liability is founded on the Law of Affirmation 30
for Cheating on the ground of fraud. To maintain
these actions no notice need be given

In warranties the Vendor is not liable for
defects so visible that every person of Common Sense
might observe them. unless the Vendor is deficient
in the Particular Sense necessary to observe that
particular defect. But if there was an inducement
and concealment as to sell a blind horse in the
dark of the evening. or if the Vendor made a war-
ranty concerning that particular defect. then he
is liable for there was a clear fraud

2d Ray 118.
Finch 289.
Salk 34.
Esp. Dig 530
Salk 211.
1d. Ray 1086.
*Vol 3 - 491

I suppose A sells unsound Property to B and
B sells the same to C. Can B recover from A
for the fraud? He has cheated C and the only
for his recovery is his liability to C. If he had
innocently sold it to C. no doubt but he might re-
cover from A for the fraud. and C. might in fact
recover from B for the defect not for the fraud.

W. Rep 745
2d Ray 117
D. - 177

But if B knew of the unsoundness and cheats
C. I think he is bad bred. he would come with a
very bad face into a Ct of justice. and charge it
with cheating him.

An Affirmation what a thing is so and so
is always equivalent to a warranty. Hence a ven-
dor acquires no advantage by a warranty, and is
false whether the Vendor knew of the falsity or not
they will support an action for false and fraud-
ulent affirmation. by which adequate damage
may

Exp. Dig 529
D. - 532
Hollo 520
2d Ray 5

1848-49 8868 may be removed. Thus far and no farther for-
mally, would the Law support an action for re-
cise or fraud. But now tho' there be nothing war-
ranted nor false affirmations, yet if there be a
concealment of facts by one party which the other
ought to have known, an action will lie for such
fraudulent concealment: for it is now an established
maxim, that, "Suppression Veri" is equally criminal
with "Suggestio falsi".

In Conn. the Sup^{or} Ct have gone one step
1 Bay 324 farther, for tho' there be not a suppression of facts
1 Selwyn 585 but they have determined that if the thing sold contain
D^r 587 some defects tho' unknown to both parties, yet
an action lies agt. the Vendor on the implied
warranty. Since the Law presumes in all sales
9 Coke 52 that the thing sold is as valuable for a sound price
1 Conn 100 is in fact so. As in case of innocent passing
3 Bk 100 counterfeit money. With respect to the sale
Hoc 3^d 265 of provisions, the Law is the same in England.

Bulwer, in It is laid down in the Books, that the Def^t
Bulwer 30 must state in an action for false affirmation
Croft 474 that the Def^t made them falsely and fraudu-
1 Fent 179 lently, or at any rate it must appear, (that
D^r 110, 378 they were so made) in the declaration, and ac-
Cuthers 90 cording to the Law of England this is necessary
2 Selwyn 593 except when they were made about the title
1 Selwyn 585 to the thing sold. For in such case it is immate-
Hoc 3^d 481 rial -

innocence, whether the Vendor knew of this falsity or not. Tho' as to this point (concerning affirmations about title) the Books hang in an equal scale of contradiction.

Sometimes a man sells Goods on an express warranty, but that on condition that the goods shall be returned to him if he will take them back. The seller not perform this condition an action may be maintained on the warranty.

A Special Agent under a limited authority can't bind the principal by any act beyond the scope of that authority. If a Servant will exceed the lawful command of his Master, the Master shall not be punished therefor. If the command was unlawful, it is otherwise. The Law raises an implied warranty in all sales that the Vendor is the owner.

If you sue another where he has been guilty of no fault, must you aver "Scienced"? No. but you will recover on the footing of the implied warranty, which the Law raises "that in all sales the Vendor is the owner" Selwyn 888 at 8.

Tho' a man cheat you sub silentio, yet if his actions amount to affirmations, those actions will support an action "for false and fraudulent affirmations." As in the case of sticking up the old Negro, blacking his hair &c. and selling him for young.

An affirmation with respect to the value of an article when it is a mere matter of opinion, and

166 Bk 573.
Selwyn 888 at 8

33 Rep 759
Polhem 143

13 Bk 109

Cathes - 90
33 Rep 57
Cro Jac 44
15 Bk 210
100 Mod 142
1 Hble 525
Cro Cha 472
15 Bk 140

100 Bk 90
15 Bk 210-11
Cro Jac 230
15 Bk 409
3 Bk 51
3 Durn 51
Selwyn 145

Shelley

10 Salt 211

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wholly uncertain, does not subject the Vendor to an action, tho his affirmation prove to be false. Is the Vendor liable for giving his opinion where the Vendor has been guilty of any neglect, as where he has neglected to take proper care to ascertain the value of the article sold. That if a Vendor declares that an article has an authentically ascertained value, as that the market price is so and so whereby the Vendor is induced to make a purchase in such case if the affirmations prove false, an action will lie against the Vendor for fraud. If he has said "it is my opinion it is worth so much" no action would lie.

There is a great alteration as to affirmations. Formerly the old Books said a man should be liable on his affirmation if it were a bona fide lie. But now he is not permitted to tell the most trifling falsehood. Formerly the Books said "No man could be a stinking fish" - but this maxim is entirely done away. The morality of the present rule is much more consistent than the former.

So if a man makes a false affirmation when by another is damaged tho he gets no benefit to himself thereby, yet he is liable to an action of fraud. As to affirm that T is a man of credit and property, & thereby induces another to trust him, and he knew at the time that he was a bankrupt. This. Formerly a mere point has received a judicial decision which has put it to rest.

* In Case of necessity, as where a man has removed
 on a fraudulent Note at Law. Chy will interfere
 and make a set-off till the other party removes dam-
 ages, lest he should become a bankrupt. 10 page 343

See full of the
 3d ed. 393
 2d ed. 1118
 1st ed. 211
 vol 3rd - 232

In Cases where there is no fraud or conceal-
 ment, but the liability grows out of the transac-
 tion, there can be no recovery on the ground of
 fraud. The action must be founded on the im-
 plied warranty. Where there is a full know-
 ledge of the defects in both parties there can be
 no fraud. So where the defects are visible; or in
 case of a mere opinion.

He may with
 out interest make
 a false affirmation
 3d ed. 59
 1st ed. 38
 2d ed. 92
 1st ed. 357
 10th ed. 470

Implied Warranty. There is always an
 implied warranty in the case of a man who undertakes
 to do any thing in the way of his profession,
 trade or occupation that he will do it faithfully and
 skillfully in default of which he will be liable to
 an action on that warranty.

2d ed. 359
 1st ed. 91
 2d ed. 106
 1st ed. 312
 1st ed. 253

But if a person hires one to do a thing not in
 the line of his profession, no such warranty is im-
 plied. But altho he is not liable for doing it
 unskillfully he is for doing it carelessly.

So the professional man he must perfect
 in his performance, yet if he acted up to the ex-
 tent of his abilities, and the mistake was such
 as the most skillful in that profession might
 have made tho he had used extraordinary diligence
 and care, he shall not be liable on that warranty.

Sub -

Suppose the purchaser knows the value of the articles purchased, to be much greater than the seller is aware of, can the seller avoid himself, if his ignorance? There are cases where he may, and where it strikes the mind of every person that the bargain is unfair. As where a man finds a jewel and not knowing the value of it, takes it to a jeweller and asks him how much it is worth. - the Goldsmith tells him £100, and purchases it for what I said, when in fact it is worth a £1000. Yet there are Cases where Ch. of Equity have refused in one or two instances lately to interfere. They are of this nature. A man discovers a valuable mine in his neighbour's Land, and purchases it at the usual price of Land in the neighbourhood, the owner not knowing any thing about the mine. Now what is the difference between this and the former case? It is this: - in the first the man had made no discovery; no good fortune attended him, but he obtained that property by his own false affirmation. In the latter Case it was the man's own good fortune which had discovered the mine, and the matter seemed so doubtful that Ch. would not interfere. -

Let the 371 If a person by any misrepresentation had induced another about to make a purchase not to make it, for the express reason that he wished to

to purchase himself, and afterwards did purchase
for a calf and then the other had a good to give
Chy would not enforce this Contract and if it were
executed would set it aside

With respect to Real Property there is a
maxim "Caveat emptor." Suppose a man
sells his Farm by metes and bounds and says there
is 100 acres when there was in fact but 50, here
the maxim "Caveat emptor" applies.

Wesley 307
D. 178
1000 500

They have not gone so far with this maxim in
personal as in Real Property.

An indolent concealment of a latent defect
in Real Property, will be viewed as equally as
will as a similar defect in Personal Property.

P. 440

Suppose you wish to purchase a Farm, and
the owner tells you there are so many acres of wood
land, so many of arable and so many of mead
ow, and the arable land is of a very superior qual
ity - when in fact it is nothing but a large of
rocks, here "Caveat emptor" applies. you might
have discovered it very easily by going over, and
revising it.

These cases are drawn from -
English Authorities, but I think they will not
apply in this Country to our Western Woodlands -
you cannot see over them as you may in Eng
land when the Lands are cleared. The maxim
can only apply to cases that may be easily as
certained, to prevent litigation.

The point -

The principles of this maxim will not apply where there is a combination to cheat. - You may see a Case in England where the maxim was not applied; the Vendor was not aware of the defect, and Chy. interfered.

Another Case where a man purchased a farm for the purpose of renting it. The Seller had, and the farm previously to that time, and told the Vendor that he got £180. rent per ann. for it. But did not tell him that £50 had to be annually expended to repair a flood-bank, &c. making of the land. Before the man executed the Contract he viewed this and refused to execute it. The Vendor said but Chy. refused to enforce the Contract.

From these Cases you will discover that if the truth might have been found out by common industry (i.e.) such as men ordinarily make use of, then the maxim of "Caveat emptor" applies. "Aliter non". If the Contract be executed Chy. relieves against it; if it be executory they interfere and will not enforce it, notwithstanding this if it be executed relief may be obtained at Law for the fraud: the remedy is in damages.

Fraud arising from the intrinsic circumstances of the Contract comes under the power of Chy. particularly, as they grant relief ostensibly on the ground of fraud, by setting them aside. There are Cases where the Contract was obtained by taking and using

under advantage of the embarrassment or distressed
 circumstances of the party, and which we cannot find
 this nature, but infer that some fraud, some
 oppression he was put on the party of whom they
 were obtained, or else that he was deprived of his
 reason. Such is the inequality of the Contract

Went 405
 1 Bro Ct 107
 1 P. W. 239
 1 Levisy 111
 It is inequa
 ly & unfair see
 1 W. 230
 2 Vesey 518

It is said a Contract cannot be set aside,
 because it is unreasonable: now it is impossible
 to ascertain what this unreasonableness means.

The truth is that such unreasonableness is
 evidence of fraud. Chy would not interfere were
 it not so. And therefore the unreasonableness and
 inequality of the Contract are the true ground
 on which these Contracts are set aside. How
 many, and many of them that are of such a na
 ture that no fraud can be inferred from them

See a case where A and B, father and son
 owed D a considerable sum of money, they were
 much embarrassed, and D said them telling them
 at the same time, that if they would let him have
 their farm he would take it as a satisfaction of
 their Debt. The farm was worth much more
 than the amount of the debt. Chy interfered and
 set aside the Contract on condition that A & B.
 would pay the Debt and Costs.

Went 405

In another case A was a man of great wealth
 B was in distress, pressed with debts. A pretended to
 be his friend let him have money when he pleased,

1 Bro Ct 9
 2 D. 175
 2 W. 402

and

and when he had got him sufficiently enthralled
made way and out of him. Chy. relieved agt. it

In these cases if the man after his release
is ever ratify the Contract Chy. says let him ratify
it. But there are a certain set of Cases which
can never be ratified, or made valid by any confir-
mation afterwards, of the Parties. — they are Con-
tracts which work as laws on third persons. — as

1 Year 338
189 Op. 1688
1 Salk 150
2 Vesey 175
D. 375

matchmaking, bargains, — marriage articles. As if
two fathers have agreed to pay their Children an annu-
sum of the marriage £ 5000 a year. The
Father of the Son says I can't afford to give you
this £ 5000 unless you give me a bond conditioned
to pay me back £ 2000. I will break up the match
the Son gives the bond. Now after the marriage the
Father never can move on that bond; it is a fraud
on third persons. Such Contracts were always
considered in Chy. as utterly void, and Ch. of Law never
suffered recovery to be had on them in any Court.

And on this same ground have proceeded
all the Compulsory Cases. As when a man is in
debt and tells his Creditors if they will agree to it he will
give up all his property by which they may receive
so much in the pound. But the Creditors agree to it
except but one. He will not unless the Creditors give him
a sum of Money or a bond for it. Now this is utterly
void and if he has paid the money he may recover
it back and if said he may avoid the bond even in a
Ch.

2 Year 000
D. 460. 499
1 Year 475
D. 240
3 D. 75
18 Year 490
2 Year 704

Of Law in England. "He always might have avoided the Contract in Ch^y

It has been contended that the bond is good when assigned being in the hands of "bona fide" purchasers. But it is not so. The maxim is that when a bond is assigned, the equity of the bond continues, let it be in whose hands it may. 18th Nov 499

When females are about to be married they frequently convey ^{away} their property voluntarily to some other person for their own use. Ch^y considers such conveyances as fraudulent being a fraud upon the married rights of Husband. If it be for a valuable consideration the sale would be good. But at any time after the marriage is agreed upon or the Courtship is commenced, voluntarily conveying property to a friend or another person for her use is considered fraudulent; this was never questioned since the decision in the Case cited. 2d Ch^y 42

But it is admitted that if a Widow about to be married convey away property by way of a provision for her children by a former marriage such conveyance would be good; if she had practiced no fraud or misrepresentation upon her husband, concerning it. If she had told her husband that she had not done it when she really had, it would be fraud. But she may do it secretly without saying any thing about it, and it will be good. The only proviso is that she must not make a misrepresentation about the matter. Such provision must 18th Nov 408
18th Nov 357
D. 744

must be for children. It is not good if made for
Brother's Sisters to be -

2 Nov^r 17

These conveyances are different from those
made previously to the marriage treaty: - when
the husband has not been imposed upon, he might
have found it out by enquiry, and it is his duty
next to have his eyes open when he makes his bar-
gain. It is said there are some contradictory ^{and} ~~opinions~~
~~opinions~~ but Judge Reeve thinks there is no ~~authority~~^{authority}.

You may see several opinions on this subject
in a case not exactly in point *Lady Scott v. Brown* &
Browne. the circumstances were these. A Mr. Gray,
was counting on the Lady S. and with his consent she
conveyed all her personal property to trustees for her
own use: a few days before the marriage was to
have been celebrated a certain Mr. Brown, a stran-
ger to her, challenged the Editor of a Newspaper who
had published a Libel on the Lady S. to a duel.
This was a mere sham duel & about midday
that Brown might get the Lady S. She was highly
pleased with the gallantry of this deed and was at the
same time told by a friend that that Brown was ac-
cidentally in love with her: she then wrote a Note informing
that her will and her property were at his service. - And
then dismissed Gray and the second day afterwards
married Brown. She knew nothing of the previous
disposition she had made of her property, and feeling
herself taken in, filed a bill in Ch. to have the
Deeds set aside & at the Objections to set them aside
the

the conveyance being made previously to his Court-
ing her. He might have enquired into the matter
and found out, he was not obliged to marry her &
if he was deceived it was his own fault. In Apr
further than this the Chancellor remarked. "It is well
enough to let a wife be deceived, he had used good
means to obtain her when she was engaged to
Mr Gray." If Bowes had been consulting her and
she had conveyed away her property the conveyance
would have been set aside

2 Bro. Ch. 305
2 Bro. Ch. 345
1 Ves. 20
2 Bro. 533
2 Eq. 59

Fraudulent Grants

These are with an intent to defraud Creditors,
in considering which it will be necessary to keep the
distinction clear in our minds, between these, and
Voluntary Grants, without any fraudulent intention.

Moore 538
Dea. Moo. 515
Co. Litt. 291
Ex. Elix. 243

By the Stat 13th of Elizabeth whenever
property is conveyed away for the purpose of
defrauding Creditors the conveyance is utterly void
and the Estate is still available to Creditors as it was
before the grant, and is liable to subsequent as
well as antecedent Creditors. But such convey-
ance stands good as between the Grantor and Grant-
ee and their representatives.

8 Co. 80
2 Rolle 779
Palmer 214
1 Moo. 119
1 Vent. 194
9 Moo. 803
Dun. Ch. 84
5 Co. 8
Cro. Jac. 270
Yelverton 196
Hobart 477

This Stat. is copy-
ied in almost all the States in the U.S.A and
Judge Reeve remarks that except in one or two
instances it is directly in affirmance of the Com. Law.

Comb. 222-49
1 Salk. 338
Cowles 434
D. 708

If the grantor with an intent to defraud Creditors

hab.

has conveyed to a "bona fide" Purchaser, who was ignorant of the fraud intended the conveyance is good and the Creditors cannot come upon it in the hands of the "bona fide" Purchaser, to make it fraudulent the Grantee must know the intention of the Grantor, to defraud his Creditors, there is a Secret Trust between them, this may be inferred from the conveyance being made for little or nothing in the consideration. And it is a great principle of Law founded in Policy that when persons have been attempting fraud or a breach of Law that the Law will not step in to the assistance of either, therefore when the fraudulent Grantee will not personally according to agreement the Law will not aid the Grantor to obtain a conveyance however strongly the Grantee may have bound himself to reconvey. And so is conveyed such fraudulent conveyance the Law will step in and help the Grantor to the possession of the fraudulent Grant by an action of Ejectment where after conveyance the Grantor remains in possession, to make reviewed the parties the conveyance is "Inchofacto" valid.

page 373-4

If the creditors want the property the conveyance as yet there is totally void they may at any time convey the Land. A man may convey away his Estate to some favourite Creditor to satisfy their Debt for the express purpose of defeating others, if the conveyance away for a fair price it is not

not fraudulent; the principle of the Com Law is that a man may prefer one Creditor to another and still be preferred. And it is as true that every Creditor may prefer himself he may attach, or levy upon the whole property, be paid his whole debt and the other Creditors get nothing. There is no fraud in that the fraud consists in creating a secret trust but how there is none. But remembered to make such a conveyance good it must have been to satisfy a Debt. If the property was of more value than the amount of the Debt and there was a clear Deed made out it is fraudulent. For the Law implies a secret trust, and an agreement that the Grantee was to pay the residue back to the Grantor, and the whole is fraudulent, and the Grantee cannot carry out his own debt. If the Estate were in Land he could not tell what part of it was his, and therefore the whole conveyance must be void. The proper mode in such case would be to take a Mortgage for the amount of his Debt and then the other Creditors would by paying him his debt be entitled to the residue; but there can be no redemption where there is a clear Deed. A conveyance by an insolvent Debtor for an inadequate price is totally void, altho the Purchaser may have paid the Consideration agreed upon, it is fraudulent throughout whether it be to satisfy a debt or not.

A conveyance made of an estate for a valuable consideration tho not to secure a debt, and there is
no

must about it yet in one case that Estate will be
liable to creditors in the hands of the grantee, viz
when he knew it was the intention of the grantor to
get it out of the reach of process i.e. to turn it into
money and away and defeat his creditors. There
is a priority between the grantor and grantee, the
latter is tho' to assist the former to defeat his cre-
ditors, and is therefore fraudulent. If there had been
no priority between them the conveyance would have
been good altho' the effect might be the same. This
is universally supported by authorities.

This proceeds upon a distinct principle from
the last rule viz that one man shall not assist
his friend or neighbour to defraud his creditors. In
all the cases I have mentioned there is a design to
cheat.

A man may under certain circum-
stances convey his Real Estate or a Part thereof to
prevent its being taken by creditors viz, when he
leaves a sufficiency of personal estate or when in
conveying a Part he leaves a sufficiency of Sale-
able Real Estate. For it is not necessary that the
creditor to satisfy his debt should be able to take
such particular estate as the debtor values more
highly than the rest, if there be plenty of other saleable
estate. But if he were to ^{sell} all his real estate that is
saleable, and leave the creditors to take unsaleable es-
tate, it would be fraudulent.

Book 1434

Do 705

Do 327

W. L. M. W.

Voluntary grants made merely as a provision for a relation or particular friend are called fraudulent. We have seen support in a voluntary grant no fraud of any kind, no intention to defraud Creditors but more by an honest and benevolent intention to provide for a wife, a child or a friend &c. and these grants stand on a totally different footing from those made with a fraudulent intention, as to respect to Subsequent Creditors, who have no lien whatever upon the Estate thus conveyed.

The Law views these grants as fraudulent in many cases, where there was no such intention. E.g. a man in good circumstances gives away a considerable part of his property to his children to set them up in life, supposing he had enough left to pay his debts: and it proves otherwise, this estate in the hands of the volunteer is looked upon as fraudulently conveyed. But by the way you will remember he is entitled to a priority as in the former cases, there was no fraudulent intent, and volition is the very essence of crimes. If there was a fraudulent intent the conveyance would be void. Subsequent Creditors may then come upon the property.

But where there was no such fraudulent intent subsequent Creditors can never come on the property in the hands of the volunteers. This was conveyed previous to the existence of their debts.

The Stat. does not say Voluntary conveyances are void but this stands or depends upon a distinct principle viz. that a man must be just before he can be generous.

A

Nov 3rd - 41

See a case cited
3 Coke 82
Land. Rep. 105
608 Ely. 444
3 T. Rep. 540

A fraudulent conveyance is void either against antecedent or subsequent creditors. The former there were different opinions on the subject - Nothing but repeated decisions put the contrary section down. It is the construction formerly given to the Stat. which made that evidence of fraud which was not so at C. G. This is the principle the construction given to the Stat. is that he meant to cheat every creditor which he subsequently had, as well as those he had antecedently.

A presumption of fact may be rebutted but a presumption of Law (which this is) cannot be rebutted or removed out of the way. The voluntary grant without any intention to defraud there can be no presumption of Law that there was no fraud.

Suppose a voluntary grant without an intention of fraud he made to a stranger, and the grantee afterwards becomes indebted the grant is void as against subsequent creditors because a conveyance against subsequent creditors when voluntarily made and not to support necessaries to provide for his family, or to make family settlements.

Tho the man was not indebted (i.e. he was in clear solvent circumstances and had no design to cheat creditors but it turned out so the conveyance is void as well against subsequent as antecedent creditors. It is not fraudulent in reality but the Stat. considers it so. If the conveyance is such, Care

case was to make a family Settlement it would be good. But by this must be understood that the persons for whom the Settlement was made were in "aff" at the time, for if they were not it is void both as to present and Subsequent creditors.

Ph. Ch. 90
2 Att's 11.
D. 94. 481
D. 520. 000
Yell. Eff. 514
2 V. 10
In this last case
Hawes v. Hawes
summed up the
Law on this subject.

Again if a man in clear solvent circumstances convey his estate to make a family Settlement on persons "in aff" say his Son, having no creditors at the time, but did it with a design to get in debt and go off it is void as against Subsequent Creditors. If he were in debt at the time of granting it to his Son, it would be void against present and Subsequent Creditors. But if he were in clear solvent circumstances, and made the provision by conveyance to his family "in aff" with no intention to defraud and deceive Subsequent Creditors, and he afterwards should become indebted to the Subsequent Creditors, can never claim it. This is the very case when it is not void against Subsequent Creditors.

page 308
303.

The Stat. says a conveyance made to defraud Creditors is void. The difficulty is how a conveyance which is not made with an intent to defraud Creditors is fraudulent and void against Subsequent Creditors. It is the presumption of Law that it is so, who we know that in reality it is not so. Still the presumption of Law cannot be rebutted. When there were debts due at the time

of the voluntary grant it is fraudulent, and the Law
 goes upon the same ground, where he grants away
 of Coke 11th his property and afterwards becomes indebted to a
 creditor 158th greater amount than he can pay. The Construc-
 tion given then is that there always was a frau-
 dent intent. On this ground it reconciles all
 the Cases. I have put Now it is not incon-
 sistent to introduce subsequent acts to expound
 a prior intention.

Now the principle applied equally well
 to the Stat. 27th of Elizabeth. It is said this
 Stat is in affirmance of the Com Law. Judge
 Reeves thinks not. It is copied in about half of
 the States. It is necessary to know its particular
 to distinguish acts done under it from acts
 done under the 13th of Elizabeth. If the Estate
 be a voluntary conveyance and then an creditor
 that is operative upon as I have already said
 by the Stat. 13th of Elizabeth. But this Stat
 27th Elizabeth is to guard ag^t fraud on purcha-
ser. It shall be a voluntary grant made to a
 person the grantor being clear of debt, and the
 same grantor afterwards sells that estate to an-
 other the grant to the volunteer is void as ag^t the
 purchaser. This is the only case under the Stat.

See in the 1st vol.
 of the 20th edit.
 for the 1st vol.
 in page 36th vol.

It is not amended by Com Law for there
 the grant would be good when there was no fraud
 intended on creditors. The design of the Stat.
 was to remedy this and declare all such Grants void

Coke 158th
 5 Coke 00

as agt subsequent purchaser. The Law is now well established that the purchaser holds it agt the prior volunteer. Previously to the making of the Stat it was considered that the grantor when he made the grant had a design to defraud - at least this was the presumption. But how can it be so now? - Every one is supposed to know the Law and therefore he can't cheat. In order to get rid of this trouble you must carry the mind back to the time when the Stat was made; then the grant was good, and consequently it was made with a fraudulent intent. You can get rid of it no other way. The conveyance now is good and the grant void. This is the whole of the Stat of Elizabeth. Where there is no such Stat as is the case in several of the States, in the U.S. the Law must be otherwise. The maxim of the Law is "Prior in tempore potior est in jure".

There is a proviso in this Stat. If the grantor himself should sell for a valuable consideration it is good, for what a grantor has done is equally good as if he had done it himself. Suppose page 381, the purchaser had asked could he hold it? - If it proceeded upon the common principle he could not. But here altho he knew, if he comes and pays the money for it he will hold it.

You will observe that after the grantor has made the voluntary agreement grant the very moment he goes to convey to any one else, the Law presumes the

Eq Off + 334P
Amber 288,
Amber 280.
B.R. 145.

the first grant made with an intention to cheat
and devised some purchases and it is therefore
void. This is the ground upon which the law
Chases is allowed to hold it tho' he knew it. It
cannot in reality be said that he meant to cheat
but we must adopt the presumption of the law
which is not rebuttable. A question was here
asked "Can the grantee if he be a relation which
would make the grant for a good consideration
maintain an action agt^d the grantor? He
cannot unless there be a valuable consideration

Marriage would be a valuable consideration
between grantee to white and relations the con-
sideration is only good, and no action could be
maintained.

There is a species of conveyance in
one respect voluntary and in another not so con-
sidered. If they are voluntary because there is
no consideration money paid. They are settle-
ments made previously to marriage. They are
not fraudulent under either of the Stat^s.

If a man make a reasonable settlement
on his wife and children tho' he was in debt at
page 365 the time it would be good as agt^d creditors. It
must be a reasonable settlement and not in-
tended to defraud creditors. If it be out of pro-
portion and intended to defraud creditors it is not
good agt^d them. In fact you must come to the
intent; if it be fraudulent the conveyance would
not

not be good. but in this case then can be no Presumption. it must be proved by fact. If the Settlement were made for any other than Wife and Child and it would not be good as against Creditors, nor to a Child alone without the Wife. it must be in Consideration of marriage. If the Estate was sold to the Wife in a reasonable manner and remained over to her brothers. So long as it is in the Wife's hands Creditors can never come upon it. But after her death the Creditors may come upon it in the hands of the brothers. If the remainder had been limited over to Child view it would be good and Creditors could not come upon it in their hands. If there be evident fraud on the face of it it is void even in the hands of the Wife. In case a Purchaser gets it from the Wife or Children it is not good in his hands. Creditors may come on it.

20 Ray 779
1 Str. 74
3 B. & W. 59
D. 344-8
D. 351

Suppose the Estate is settled on the Wife in Consideration of marriage. and the Husband afterwards sells it. The last Sale is void. and the Wife holds it. She is a Purchaser for a valuable Consideration. These are all cases before marriage.

Now if the Settlement were made after marriage Croft 158 and there were Creditors at the time it would not be good against them nor could it be good as to Purchaser. view afterwards for a valuable Consideration, but as to Subsequent Creditors it would be good as much So as any other voluntary Grant.

Croft 158
2 Leving 140
Cooper 278
D. 432
2 Str. 148
H. & J. 57

1899 *St. 354*
Went's 193

If the husband has entered into a written agreement before marriage but for some reason either that it was not convenient or that the Estate had not yet come to his possession or some other good reason had not made the settlement till after marriage but then made it it stands upon the same footing as if it had been made before marriage. For the maxim is this. "Chy in this venue always can show what is agreed to be done, as soon as the time of the agreement." It is necessary to remember this maxim. Eg, I agree to convey property to P. N. and dies. Chy considers that property as P. N.'s and vests it to be conveyed to him. and if P. N. should die any time after the agreement the property is considered as his and Chy will vest it to be conveyed to his heirs.

60 *St. 434*
*28 *St. 304**

page 455.
 430

Suppose the agreement had been a parol one entered into before marriage and the husband executed it afterwards. It is contended by some that it is void, on this ground, that any parol agreement respecting Real Estate is void. It must be in writing to make it binding. Creditors wish to come on the property and say there never was any agreement entered into. Such as the Law requires. But Judge Reeves says this is all fallacious. - The Stat requiring it to be in writing means that the contracting party may avoid it if he pleases. but if he ratifies it it is equally as good as if the agreement before the marriage had been in writing.

Suppose

Suppose the Husband enters into an agreement of this kind in writing, and before he executes it he asks for the money the Settlement on his Wife. He sells it to a Stranger. Can the Stranger hold it? We have already seen that if he had made the Settlement and then sold it, that the Sale would be void. He could not sell it for it was his. But in this case if the Purchaser was innocent and did not know of the previous agreement Chy would refuse to compel him to convey it to the wife, he is a bona fide purchaser and has paid his money. But if he had known of the agreement Chy would decree agt. him, and compel him to convey it over to his Wife.

Remember that in the cases above the Settlement made after marriage must be specifically according to the agreement entered into before marriage or else it will not be good agt. creditors. Eg. previously to the marriage T & S agree to settle on his Wife his farm Black-acre and after the marriage instead of specifically Black-acre on her, makes a Settlement of Stone-acre upon her; this is void as agt. creditors, and they may come on it for their debts. There are cases where a man may make a Settlement after marriage which will be good agt. creditors and all others besides. It is when property is left to the Wife after marriage and he never having made a sufficient Settlement on her before makes a reasonable Settlement on her.

2d An. 822
2 Yesy, 307
6th Sep. 287

2 Yesy 187
Amble 121

with 188 her out of this property which has to be left to
2d° 477 her. This Settlement is good: no matter whether
the property is Personal or Real it is a good Con-
sideration for a reasonable Settlement.

There is one kind of a Settlement which a
man may make that stands upon a differ-
ent footing from those I have mentioned, viz.

A Married man and wife Separate and he
makes a Settlement upon her. The last Cases
were in Consideration of Marriage; but this is
in Consideration of a Separation, and stands on
the same footing of any other voluntary Grant
2d° 152 as a *gr. b. Creditors*. If they cannot otherwise
Double 590 get their debts they may come upon this prop-
erty in the hands of the Wife. Now is such
a Settlement good *as gr. b.* Subsequent Purchasers
for a valuable Consideration if they knew no-
thing of the previous Settlement. If they did
"knew" thus differing from the Grants treated
of in the former Lecture.

All this doctrine applies equally well
to personal and to real property. There is one
thing which seems to create some difficulty in
fraudulent conveyances. If it be Real property
or a House or a Warehouse that is fraudulently con-
veyed away, you may come upon the property as
if it had never been conveyed, you may convey on it as
the property of the Grantor at any time during his
life; and after he is dead you may consider the

granted as Ex^o "de son tort" and sue him as such
for the property thus conveyed. There is no diffi-
culty thus far. But suppose I grant or give
away Money fraudulently. how can you get it back?

You can't lay on it and sell it at the post who
would buy? No one would put himself to the trouble
of buying money by paying a like sum of
money for it and it would scarcely be worth off the
low its value.

The only way is to file a bill in
Chy. and they will compel the Donee to pay it
by laying a penalty on them for not doing it.

But there is still a difficulty for the Donee may
be unable to pay. There is therefore a defect of
justice in this particular.

There is another case which has been a
matter of great Controversy both in this Country
and in England; tho' it is now altogether settled
in England and has been in several States of
the U. S.; it is this. A man makes an af-
firmation of his property, being in doubtful
circumstances, or being insolvent as it afterwards
turns out, to three creditors to satisfy their Debts
and if there shall be any property left after their
debts are discharged then his other creditors may
have it. Now is this assignment valid? Or
suppose he assigns it to all and one refuse, can
he break up the assignment to the others? We
know that a Debtor cannot assign to a creditor
a part of his estate, if it were to satisfy a debt and the
af-

Eq. Off. 149
2 Nov 490.

assignment must be to satisfy a Debt or as far as it goes, not a gen^l assignment; nor can there be a rebutting trust founded to suspect such assignment would be fraudulent. —

page 369,

550 p^o 420.

In England it is indubitably settled that such an assignment as is mentioned above is valid, and the principle is plain only simplify it — The contention has been that it is fraudulent; it receives and disappoints creditors. But this is not so it is not fraudulent to disappoint creditors for a man may prefer whatever creditor he pleases, and what is the difference if he assign it over to a creditor or to a Trustee for the use of some creditors and not for others. It all turns upon the principle that a man may prefer whatever creditor he pleases. Judge Reeve says he believes in two cases in South Carolina, they agreed with the English decisions, one "Contra" in North Carolina. One decision formerly in Pennsylvania "Contra" — But since that time there have been two or three decisions according to those in England. — Judge Blackridge being of a different opinion. In New York these decisions are similar to the English. Previously to any of these it came up before our Sup^r Ct of Errors, in Court and it was decided that the assignment was not fraudulent. It again came up and was decided "Contra", then there was decided, a 2^d decision

decision. no precedent. It then came up the third time. and was then finally determined as it had been in England. not fraudulent

Suppose a conveyance be made to a creditor whose debt is barred by the Stat^e of Limitations. Can the other creditors avoid it? We know that a man need not pay a debt barred by the Stat^e of Limitations, if he is so disposed; but this may be as meritorious as any other creditor and why may he not be paid. The fact is the Debtor may pay him and the other creditors cannot complain. analogy 178,

Suppose a Debtor convey in trust for his creditors to another, and the Trustee will not give up his trust. what is to be done? Creditors may compel him to fulfill his trust by going to Ch^{cy}. And after the owner has conveyed it to this Trustee, if he (the owner) sells it to a "bona fide" purchaser who knew nothing of the trust - this purchaser cannot get it; the "Equitable trust". It would be otherwise if the purchaser knew of the trust. Chapter 33

Charitable Donations are in some respect different from Common Voluntary Grants.

Formerly in England a man could not give away his property to religious Houses or for any charitable purposes, especially during the times of Popish Superstition. But there are a number of Stat^s made called Stat^s of Mortmain after this, and now by Stat^e 43^d of Elizabeth Grants may

may be made to Charitable Institutions.

vol 5th 384

11 Nov 230

In this County there are very many bodies incorporated, and by their charters they are allowed to receive and hold property generally with a restriction that the clear yearly value shall not exceed such an amount. Gifts to these Corporated bodies are void as ag^t Creditors. But they are good as ag^t subsequent purchasers the same as if they were purchasers for a valuable consideration.

Sub page 103,

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"Donatio Causa Mortis" This is a species of voluntary grant. Upon the death of the donor it does not go to the Ex^r or Adm^r, but goes immediately to the donee, and yet such a gift is void as ag^t Creditors. How can Creditors get at it? It is not considered part of the estate, it is not inventoried, it is not a debt in the hands of the Ex^r. At C Law if there be a deficiency of assets to pay Creditors they may sue this donee as Ex^r de bonis non and thus recover of him.

page 217.
147

10 Nov 405

11 Nov 777

28 Nov 111

When there is an average Law it seems difficult to carry this principle thro'. If a Creditor could sue him thus he might recover his whole Debt while other Creditors get only half of theirs, and it is as much a principle of the Stat. that all Creditors must be paid equally as it is a principle of the C Law that any one Creditor may prefer himself and remove all his debt to the exclusion of the rest, and therefore one

one principle must be destroyed when the other
 governs. Judge Reed thinks the correct
 mode would be to inventory the property, and
 whenever there is an average sale. The Ex. does
 not claim for any other than for creditors let
 him be agent for them.

A person instead of conveying away an
 Estate to operate eventually on creditors part with
 his money by purchasing an Estate in the name
 of his children, not in his own name. Now if
 he does it with an intent to defraud creditors, it
 is equally bad as tho he had parted with an Es-
 tate in order to defraud them. If he cannot
 do it with such an intent but unfortunately it
 turns out so, it is said not to be within the Stat
 but relief may be had in Equity. Brooks 550
2 N. 470
D. - 490
Vol 5. 385

In Equity these children are considered as
 trustees for creditors, nobody can claim it but
 creditors no body else has a right to claim.

There is no room for the Stat 27th Elizabeth 20th Feb 231.
R. R. 111
 to operate here, it was not made to preserve the
 rights of creditors, but to let "bond fide" purchasers D. - 607.
 have their land estate as prior voluntary grant-
 eds. there is no equity in that Stat. that can ap-
 ply here; it is for a distinct purpose from the
 Stat 13th of Elizabeth.

The Stat 27th of Elizabeth I observed does
 not exist in all the States, nor is there any
 need.

need of it where Deeds are recorded for a man is not in danger of being cheated where Deeds are recorded, he may search the records and find out for himself. The intention of the Stat^t was to prevent cheating Purchasers where Deeds were not recorded. This was the object at the time of making the Stat^t. There is no danger of cheating now, but we must carry ourselves back to the time of making the Stat^t. When that was the presumption.

A man may sometimes purchase in the name of himself and Son; his object being that as he would probably die first, his Son might hold it ag^t Creditors. This creates no joint Tenancy to operate ag^t Creditors; so Equity will determine.

There is another mode by which a man may part with his property, which if allowed would be prejudicial to Creditors. viz. A man voluntarily gives a Bond to his Son it is a sealed instrument and cannot be assigned into, and what will you do? Creditors must not be defeated. This bond is not a Debt ag^t Creditors, but it is to be preferred to any Legacies. Suppose this money should be paid to the Son, and Creditors can't get their Debts. They will compel him to give that money up. But say the Father has not paid the money but

but the Son Sues the Bond and has moved the money Chy will now the money to be & down 18th Chy 17.
 & up. Suppose he has not moved the money 18th Chy 293
 but lived upon Land; the Creditors may lay
 upon the same Land and obtain their Debts
 in preference to the voluntary bond-man.

Suppose the obligor dies what then is to be
 done? This bond must be paid & title after
 creditors; but after they are satisfied it has the
 preference to all others, whether Children or Legates
 because a voluntary bond is always the connect-
 ing link between Creditors and Legates.

The holder of this bond as soon as his Father
 dies claims it of the Ex^r; he makes answer
 that he understands that it is a voluntary bond
 and he will not pay it till all the Creditors are
 paid. The holder of the Bond Sues the Ex^r. It page 145.
 there is a defining of assets the Ex^r method to fol. 387.
 proceed is to file a bill in Chy. citing all the
 Creditors and this holder of the voluntary bond to
 attend. and he then leaves them to quarrel it
 out at their own expense and amounting to the
 sum he afterwards pays them.

Suppose a Simple Contract Creditor Sues
 the Ex^r. - he replies he has no assets in his
 hands except the amount of a Bond (being a
 voluntary one), and as it is a sealed instrument - 18th Chy 176
 he says it is a bar to any Suit of a Simple
 Contract

Contract and so. The Court now replies over that it is a voluntary bond then they mean by it that if the Bond were not voluntary it would be a bad. If the Jury find it to be a voluntary Bond the Ex. must pay the Simple Contract and so first. The most usual way is to file a bill in Ch. asking them to attend and squabble it out at their own expense.

page 217.

There is a difficulty which will always arise when there is an average Law, and I will suppose a Case. An Estate is represented as insolvent; upon examination it is found that without the bond the Estate would be solvent, but by its commission the Estate would be rendered insolvent. Therefore agreeably to the rule that Creditors must be preferred to Volunteers, the Commissioners reject the Bond, and on such rejection the Estate not only pays the Debts, but there is still a surplus say £50, the Bond is for £100. Now agreeably to the rule that a holder of a voluntary Bond shall be preferred to all other volunteers the obligee of the Bond ought to come in and take the £50 in preference to any Legatee or next of kin; but the rejection of a Debt by the Commissioners totally destroys it so that the Debtor can have no demand in preference on anyone. You see then that by striking him off he is barred from the redress to which above all others he is best entitled. If he be not

not struck off creditors long their debts in part
 therefore it seems that the Ex^{or} may proceed
 without transgressing some one prin-
 ciple of Law. However this difficulty may be
 removed. Judge Reeve thinks by the Commis-
 sioners in such case taking an account of the
 Bond and carrying it into the Ct of Probate to
 stand as a Legacy of the first kind and be first
 entitled to payment on a Supplement.

There is an important question upon which
 ancient Lawyers very much differ. It is this -

When one makes a conveyance to another with
 an intent to defraud his Creditors, and the Grantee
 of this Conveyance conveys to a "bona fide" purchaser
 how is the Conveyance in the hands of the "bona fide"
 purchaser void as ag^t Creditors? - It has been
 decided in Conn^t at the last Ct of Errors, that
 it was 5 Judges against 3. Judge Reeve has
 written his opinion at full length which he read
 in the Lecture Room (which see and study)

page 307.

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Judge Reeve apprehends there has been a mis-
 taken application of the authorities upholding the
 conveyance as they refer to cases under the Stat^t
 27th of Elizabeth and he has demonstrably proved
 that the cases under this second Stat^t are not an-
 alogous. - You may see the authorities they rely on.* -

*Sisid^r 123
 1G^o 243
 2Thom^s 123
 3Levin^s 387
 Godbalt 181
 Law^r 1134
 D^o 708
 Com^b 222
 D^o 49 249
 Hobart 477
 Holt 2

I have said that the Law with respect to frau-
 dent Conveyances which I have been laying down
 relates -

catches as well as personal as Real Property —
 But there is a very great difficulty in many cases
 in ascertaining the land. Suppose a Merchant
 conveys all his Stock of Goods to J.S. and still con-
 tinues in the Store selling the goods. it is "quid
 facit" evidenced that the conveyance to J.S. was
 fraudulent for he still remains in Possession. but
 yet it may turn out otherwise. It may appear
 that A owed a Debt to the amount of these goods
 to J.S. and that they had settled accounts, paid, and
 J.S. permitted A to sell the Goods for him. But
 this must be clearly made out and all similar
 cases must be made out. There ought to
 be a change of Possession also this cannot very
 frequently be done. It is difficult to ascer-
 tain the land and any thing which will ac-
 count for not taking Possession will be suffi-
 cient to show that there was no land. If I
 were to lend you my Horse to go to Goshen you
 having Possession of the Horse would not enable
 you to sell him; for this manner of lending a
 Horse is very frequent. But if I were to lend
 him to go Georgia and you were to sell him then
 the Purchaser would hold him; for you having
 him in Possession so far from home would be
 evidenced that you owned him. For it is a very
 rare thing to lend a horse to go that distance. So
 that to determine it there must be something which
 evidences a belief that the person having the Possession
 is the owner. See Twines Case *

* 8 Coke 82

Real Property conveyed and left in possession
of the Vendor does not furnish that evidence.

15 Lalk 308
12 Geo 2 75
Hobart 72
Hobart 56
2 Geo 2 75 21
Haltob 54

The question then is in all cases will the
possession evidence such a title or will it do
evid? This must be determined by your own
judgment, no precise rule can be laid down.

There is a now important question upon which
eminent Lawyers differ. It is this,

When one makes a conveyance to another
with an intent to defraud his creditors and the
grantee of this conveyance conveys to a bona fide
purchaser is the conveyance in the hands of the
"bona fide" purchaser void as against creditors? -

This question has been decided in Conn. at the
last Court of Errors, Sir Sugel says there to be void as
against creditors. Sir Phelps' opinion is in these words viz

"I would observe before I consider the point in
controversy directly, that one may purchase of an-
other without any intention to aid him in any
fraudulent purpose and yet the seller intend he
conveys thereby to defraud his creditors,
yet in this case the conveyance is not void in the
hands of the purchaser, for there was no secret
trust that can be presumed between the grant-
or and the grantee. The question then is -

when there is a fraudulent design in the grantor
to dispose of his property as to defraud his cred-
itors, and the grantee receives it with a view to
aid in the design, is such conveyance void against
creditors in the hands of a "bona fide" grantee of
the fraudulent grantor? The obvious mean-

ing of the words of the Stat. which declared all
such conveyances to be utterly void against creditors
is that as against creditors the grantee has no title
but the estate remains in the grantor liable to
his

his Debt and such has ever been the understand-
 ing of all men. If the Grantor has no title left
 credited it would be natural to conclude that he
 could convey none left credited. It must be
 admitted that in ordinary cases it is so, that is,
 that a person having no title cannot convey
 any the maxim "quod non habet, non dedit"
 is a maxim of general applicability. I am
 fully aware that there are cases where a title
 may be conveyed by one who has none, which
 I will presently notice but they all stand on
 grounds very distinct from this question, and
 the reasons of those cases, bear no analogy to
 this. When we give a construction to a Stat.
 if we find that such construction will proba-
 bly defeat the object which the Legislature had
 in view we ought to be very jealous of it; may
 I say it down as a sound rule that it is not
 the true construction; no facility to evade the
 object which the Stat. has in view to accom-
 plish ought ever to be admitted. The object
 which the Law had in view cannot be mistaken
 it doubtless was to prevent persons conveying their
 property into the hands of another belidist who
 and the Grantor there was a secret Trust that
 the Grantor should have the benefit of it, at the
 expense of creditors, by which means it was ob-
 viously withdrawn from being a fund to sat-
 isfy creditors and converted into a fund to sat-
 isfy

Grant

Support the Dictum, according to the rule laid down the construction that the fraud must grant or can convey a good title to the "bona fide" purchaser will tend to defeat this object of the Law. Such conveyance will not be good. That it will not I think is clear when the grantor and the grantee are conspiring to defraud the creditors of the grantor and knowing that while the property remains in the hands of the grantee that their dishonest purposes will be frustrated, if the fraud is discovered. There will be in many cases no difficulty in finding a real "bona fide" purchaser & in many others one apparently so. and all this is part of the plan entered into to corrupt the law and defeat the Law. The Law it seems to me is made in vain, if such an evasion of it is to be sanctioned by the adjudication of Courts.

Again I apprehend it will not be found that the words "utterly void" or "void to all intents and purposes" are used in a Stat. that even such a construction has been given as to invalidate grants, conveyances, or sales be in the hands of a "bona fide" purchaser. Provided there exists a claim of any person agt. such grants or sale in the hands of the first grantee, obligor or promisee. Hence it is that where Promissory Notes are infected with usury or gambling, altho negotiable in the hands of a "bona fide" holder are of no avail agt. the claims of the maker. It is impossible to

con-

conceived a stronger case than this, for here is not
 interested the claimant of a third person who had in
 no way contributed to the conveyance, but the
 maker himself who was "party" to the wrong act
 who had put the note into market and had
 contributed to its negotiability. This was a deter-
 mination in a Commercial Country where every
 thing is strained to give effect to a Note in the
 hands of a "bona fide" holder. Why then was not
 such a Note helden good agt. the Maker? & Surely
 it would have been if it had been possible; for
 the claims of Equity and the still Superior claims
 of Policy seemed to require that it should have
 been held good agt. the Maker. But the truth
 is and so it appears from the declaration of Ed
 Mansfield it was impossible. the words of the
 Stat. were too strong, it was made "void to all
 intents and purposes" - and Policy greater than the
 opposing Policy of Commercial regulations, requi-
 red that no such construction should be given
 as would defeat the object of the Law for in this
 case as in the case before the Court, if the
 Maker of the Note and the Promisee continued
 to evade the Law of usury, it is but for the
 maker to execute a negotiable Note to the
 Promisee, and then the Promisee to negotiate
 the Note. If this Note be not valid the usury
 is purged, and the Stat. ceases to have the least
 effect. The Policy of the Law which was to pre-
 vent

prevent, such a transaction from being a valid, transaction, will never suffer such an occasion to defeat its provisions, and this altho' there seems to be no equity on the part of the Maker and just equity on the part of the holder, must all yield to the Superior equity of general Justice which declares such transactions to be void. It is a much stronger case to induce the Court, than the one now before them to give effect to the transactions, for in this case altho' it resembles, the other in this, that it is declared to be "utterly void" as against creditors which is surely as strongly expressed as in the Stat. of New York, which is "void to all intents, and purposes," and nothing can be more void than to be utterly so for in that case it is void to all intents, and purposes to give effect then to the Grant, of the fraudulent Grantee, in the hands of the "bona fide" purchaser would have the same effect to defeat the provisions of this Stat. as it would to defeat the provisions of the Stat. of New York to give effect to an fraudulent deed in the hands of a "bona fide" holder, So Mansfield found it impossible to give effect to such by reason of the said Stat. for the same reason he would have found it impossible to have given effect to a conveyance from a fraudulent Grantee to a "bona fide" purchaser.

But there is in point of Equity this marked difference in favour of the present decision,

that the person attempted to be injured by the fraudulent Grant, had in no measure contributed to the fraud, and had no hand in promoting the conveyance. In both cases the equity of the "bona fide" purchaser is equal. But in that of the promissory Note, the maker has no equity, whereas in the case of the fraudulent conveyance the equity of the creditor is equal at least to that of the purchaser, for he had trusted the grantor on the credit of his Estate, which is by the conveyance attempted to be withdrawn out of his reach, and this was the equity which the Stat. meant to protect; it therefore in a case governed by similar principles and where the claim of the party that the "bona fide" holder should not be protected, agt. his claim, altho' his equity is not so great, as the claimant in the present case, we find the Law distinctly laid down that the "bona fide" holder must yield to the Superior force of the positive declaration of the Stat. Surely then in this case "a fortiori" it must be a successful and equal argument, that the claims of the "bona fide" grantee of the fraudulent grantee must yield to the Superior force of the regulations of the Stat. agt. fraudulent conveyances.

I have heard it said that on every principle the equity of the "bona fide" purchaser is as great as the equity of the creditor, so that even upon the hypothesis that such purchaser has no title

title neither has the creditor any and being in equal equity, and the purchaser being in possession such possession shall not be disturbed.

The answer to this is; admitting the equity to be equal and one in possession, yet possession agt the claims of another, as all nothing if the other claim is older in point of time, no maxim of Law stands on firmer grounds than this: "*qui prior est in tempore potior est in jure*," and this maxim also agt, without any exception from its universal influence settled at once the opposing claims of all who without legal title have equal equity. The claim of the purchaser was unknown long after that of the creditor existed; by claim, I do not mean any specific lien created on the thing conveyed, but only that equitable right which every creditor has, to the property of his Debtor, that it shall not be taken from him, by a fraudulent conveyance between the grantor and the grantee; which the Law considered to be a right of sufficient magnitude to protect agt a fraudulent conveyance, and this right must have existed prior to the purchase. Claim for if it had not there could not have been a fraudulent conveyance. The advocates of the Debtor's claim contend, that the creditor has no specific lien on the property conveyed, so that the Debtor might convey the whole to a "bona fide" purchaser, and such a conveyance, it is not pretended, can be

imputed that the fraudulent Grantor stands in the place of the Grantor and that whatever the Grantor might do the Grantee having all the rights of the Grantor (for the conveyance is good agst the Grantor) - may also do, and as the Grantor may convey to a "bona fide" purchaser and the conveyance is valid, altho the property conveyed is withdrawn from the reach of the creditor. So the Grantee may convey to a "bona fide" purchaser and it will be valid, altho the property is withdrawn from the reach of creditors, and by this means no greater injury is done to the creditors than when the Debtor himself conveys. I apprehend that a fallacy lurks beneath this reasoning. When a Debtor conveys his property to a "bona fide" purchaser he is not by this means disabled from paying his Debts, if probably, will be the means of enabling him to pay his Debts with greater facility; there is no mere surmison that he has the least intention of fraud or that his creditors will be injured thereby, and as the creditors had not secured any lien on the property the Law never intended to prevent the Debtor from selling his property, always presuming that he meant to deal fairly with them. Now that can be said in the case is that it is possible for the debtor with more ease to defraud his creditors, when his property is sold and converted into cash, than when it is paid to him; but the Law does not calculate upon any such possible case of fraudulent conversion.

intention but always presumed the contrary.
 Upon the supposition that the Debtor is purporting
 to pay his honest Debts, after having conveyed away
 his property for a valuable consideration he is not
 on that account the less able to pay and the Law
 is always open to the Creditor, to enforce his claims,
 and the remedies provided by Law must be pre-
 sumed to be abundantly sufficient to enforce them,
 if the property is not liable to be taken being sold
 the body is liable to be taken on a "Capias ad
 Satisfaciendum" and holden until payment is
 made, which the Law presumes will be made
 to procure the release of the body. How differ-
 ent is the case when the fraudulent grantee conveys
 to the "bona fide" purchaser. The Debtor is by this
 fraudulent conveyance utterly disabled to pay his
 Debts, for he can have no demands on his grantee
 for the purchase money; no fund is created to en-
 able him to pay his Debts, the fund of the frau-
 dent grantee, is indeed increased and all this at
 the expense of the creditors, without their having
 any possible chance realizing any thing from their
 Debtor's property. The object of the Stat. was to pro-
 vide agt the property of the Debtor from being con-
 veyed away fraudulently out of the reach of the Cred-
 itors; of this there is no danger when it is an hon-
 est conveyance by the Debtor himself. The
 Law would not calculate agt this but when the
 property is fraudulently conveyed away, and then

by the Grantee conveyed away to another, the very thing which the Law meant to prevent is accomplished, - the Creditors is defeated of any effectual remedy, and therefore the Law is calculated agt. such an event, and deems such conveyance invalid.

The two Cases are so far from resembling each other, they are in direct opposition. In the one Case no right of the Creditors is affected or endangered, there was no presumption of Fraud, no fraudulent intention to defeat Creditors, of their claims but an honest intention to satisfy them.

In the other the object was to defeat the Creditors claims, and by the conveyance of the fraudulent Grantee to a "bona fide" purchaser this object is accomplished, the very thing which the Stat. intended to prevent takes place if a conveyance to a "bona fide" purchaser by the fraudulent Grantee is held to be valid.

I have heard an argument suggested to avoid the force of this reasoning, which appears to me so wholly unfounded in principle that I should not have noticed it as it was not urged by the Counsel in the argument of the Case, was it not that the seeming equity attending it may possibly induce some to believe it worthy of consideration. It is - that to secure the rights of the Creditors, and also of the "bona fide" purchaser, the Sale ought to be deemed valid and the purchase money in the hands of the fraudulent Grantee as belonging

belonging to the Creditors, and that the same may be removed by the Creditors out of his hands that in fact he has become Debtor to the Creditors for so much money received to their use. It is impossible to conceive how a Creditor is to obtain his Debt from the Grantor in the event of the assets being insufficient to pay all the Debt.

Is he liable to the Creditor who first sues for his whole Debt, or is the Ct to go into a settlement of the claims of all the Creditors and strike an average and render Judgment for this average sum?

But it is claimed that the Grantor and Grantee can never compel a Creditor to change his Debt or by any thing which they can do. It is contended it is analogous to other well known Cases, to secure the "bona fide" Purchaser. - It is compared to a Sale in Market overt. Sales at Vendue by the Sheriff, &c. or currency obtained by theft or fraud and passed to others. for in none of these Cases, has the Seller any title to the article sold, and yet the Purchaser is protected. All these Cases and every other which is governed by the same principles are exceptions to the "quod non habet non dabit," but to an attentive observer they will not appear to have any analogy to the Case before the Court. There are all Cases in which the Purchaser is protected not on account of his Superior equity, for the man who purchases a stolen Horse in market overt has no greater equity,

equity than the original purchaser of the Horse than the man who innocently purchases of a Thief at private sale. The Purchaser has paid his money in both cases and if the Horse is reclaimed by the original proprietor he must lose his money in the latter case and in the former he will not. We must then look to some other principle which governs in these excepted cases than a regard to the equity of the purchaser's case for that is as strong in the one as in the other case and yet in one it is wholly inoperative - the truth is these cases are governed wholly by principles of policy they are so determined not from a regard to any private right but from a regard to public good. The Equity of the Law which are always deemed salutary will be defeated if their intended operation if the decisions were agt. the purchaser. No man would venture to purchase of a stranger at a fair or at a Sheriff's vendue if were liable to lose the property purchased. It would discourage all dealing among men if a man's right to currency was called in question after having fairly received it. To prevent therefore the salutary Laws of Society from being frustrated in their operation the Superior equity of him who is prior in time "yield" to an inferior claim. But where no such reason of policy exists I trust no case will be found where a purchase from one who has

has no title, has been protected from the claims of others. B sold to C, and he to D, the article sold passes thro a variety of hands, this furnishes no argument in the mouth of the last purchaser agt the claims of A if he has title and B had none. However inconvenient it may be to disturb the possession of the last purchaser and all intermediate sales, and surely in point of policy there is as much reason to protect the last purchaser as in the case before the Court.

What Law will be defeated of its operation if the bona fide purchaser of a fraudulent grant cannot hold his land agt a creditor, when the title of the grant was "utterly void" against such creditor? Surely none, but on the other hand the intention of the Stat. agt. fraudulent conveyances would be often defeated, and very great facility be afforded to evade it if such conveyances should be held valid. This view of the subject I apprehend must convince every person, that the cases argued from are in no respect, analogous to the case before the Court.

But it is said that no case is to be found where a conveyed fraudulent in its creation may become valid by matter "ex post facto" as where A conveyed to B without valuable consideration, and B conveyed to C for valuable consideration that C can hold this estate. The truth is that such a conveyance is not fraudulent.

see 5th 389

fraudulent, except there were creditors. But the
 case is where A conveyed to B without considera-
 tion, and B to C for one, and then A conveyed
 to D for a valuable consideration, in such
 case it is held that C will hold agst D.
 But there are cases under the Stat. 5th of Eliz.
 rendering conveyances fraudulent as to Purchaser
but void. But these cases are governed by totally
 distinct principles from those under the Stat.
 13th Elizabeth. and these are the cases, where it
 is said that what the grantor A can do the grant-
 ee B can do, so that if A had conveyed to C for
 a valuable consideration and then to D C
 would hold agst D. So if B had done the same
 by conveying to C it would be good and he would
 hold agst D, as much as if A had conveyed to C
 then to D. in such case no right of any per-
 son is affected for B had when he conveyed the
 whole title, it was void as to no person then
 in being for there were no creditors. If there
 had been it would have been void agst them
 whilst in the hands of B. but it is necessarily
 a case where there are no creditors. viz. B. title
 at the time he conveyed to C for a valuable con-
 sideration was good agst all the world. nothing
 can be more reasonable than thus to say
 "what A could have done B might do." - for no
 persons right could be affected by his conveyance
 and when C had obtained it with a valuable
 con-

consideration he ought to hold it agt. D. and
here the maxim applies, "qui prior est in
tempore potior est in jure."

But it is said that the Stat. makes it
conveyance to B void as agt. a value purchased
of A with a valuable consideration. Now it
will be observed that it was not void then un-
til D purchased for until a purchase appears
it is good: but where there are creditors it is void
in its creation agt. them. If this conveyance
ever became void it was when D purchased
but before that time C had purchased of B
for a valuable consideration, and B may well
be considered as standing in A's place and
what was done by B is done by A. But
where there are creditors then B is a fraudulent
grantee and has no power to convey to C so as
to affect creditors; but under the 13th of Elizabeth
B is not a fraudulent grantee when he con-
veys to C for a valuable consideration. The cases
have no analogy to each other. But what is
decisive of the question is that the Stat. in its
proviso has provided that the conveyance of B
(the voluntary grantee of A for a valuable con-
sideration) shall be valid; as in the Stat. 13th
Elizabeth provision is made, if the grantee con-
veys for a valuable consideration to a bona fide
purchaser the conveyance is good. No matter
if his motive was that he might thereby with-
draw

withdrawn his property from the law of his Ord-
 inance yet the Grantee not being fraudulent he
 shall hold the property. So too the Statth 27th
 Elizth after enacting that a conveyance without
 a valuable consideration shall be void as to a
 purchaser ^{of the same property} with a valuable consideration, then
 provides that no conveyance where there has been
 a valuable consideration paid by a bona fide
 purchaser shall notwithstanding this act be
 impeached. This proviso can relate to no convey-
 ances but one made by the Voluntary Grantee, it
 cannot relate to the conveyance made to the
 Voluntary Grantee, for that is not made with
 consideration; it cannot relate to a second con-
 veyance with consideration by the Grantor, for
 in the body of the act it is provided that such
 conveyance shall be good ag^t the Voluntary
 Grantee and it would be perfectly ridiculous
 to provide in the proviso that such convey-
 ances should not be impeached, any thing in
 the act notwithstanding since the whole object
 of the act was to validate it. It cannot then
 relate to any thing but the conveyance by the
 Voluntary Grantee providing that in such case
 if he conveyed for a valuable consideration,
 that conveyance should not be impeached, not-
 withstanding the conveyance to him was vol-
 untary. The obvious language of the Statth and
 the proviso was this, "if a Grantor conveyed to a
 grantee."

granted without consideration and then convey
 to a grantee with the first shall be void in
 that event, and the last prevail But in case
 the first granted convey to another for a value-
 able consideration it shall never be impeach-
 ed by any subsequent conveyance by the first
 grantor; and nothing can be more reasonable
 than this, for the clear intention was that a
 "bona fide" purchaser who had paid a value-
 able consideration should be preferred to a
 voluntary grantee, and this intention is as com-
 pletely fulfilled when the voluntary grantee con-
 vey for a valuable consideration as where the
 original grantor does, it may well be said
 that what the grantor could do the grantee
 can do. In both cases the purchaser for a val-
 uable consideration holds, and where the vol-
 untary grantee convey the right of no person
 is affected by it. There is then no analogy be-
 twixt the cases of conveyance by the grantee
 under the 13th of Elizth and 27th of Elizth, for under
 the 13th the conveyance by the grantee is in its
 creation void as to creditors, under the 27th Elizth
 it is not void in its creation as to any person
 under the 13th Elizth where the grantee convey
 he had no title ag^t creditors, and therefore con-
 veyed none. Under the 27th of Elizth the grantee
 title when he conveyed was good ag^t every per-
 son, and therefore he could and did convey a title,

and the Stat. expressly provides that such title
 shall not be inducted under the 13th of Eliz.th
 the object of the Stat. was to prevent the prop-
 erty of the Debtor being withdrawn from the
 Creditors by collusion. To sanction such a con-
 veyance would afford a facility, no defeat that
 object. The object of the 2^d of Eliz.th was that the
 grantee who paid a valuable consideration
 should hold the Land to sanction the convey-
 ance by the grantee for a valuable consid-
 eration would completely attain that object"

4067

4087

1414

419

420.

428

Statute of Frauds and Perjuries

by J. G. Esq.

October 1812

There is at Common Law a division of Contracts into Special and Simple Contracts. The former of which are required to be in writing and under seal but of this division I am not now to treat.

The Stat^e entitled the Statute of Frauds and Perjuries 29th of Charles 2^d requires some Contracts to be in writing. The distinction which this Stat^e introduces is entirely unknown at C. L.

The division of Contracts at C. Law is as I have observed into Simple and Special Contracts. The former of which are either parol or in writing being without Seal. Now the Stat^e 29th of Charles 2^d has introduced a distinction between Contracts by parol and those in writing unsealed.

I have farther to mention that our Stat^e passed in 1771 is so far as it extends to the same Subjects or objects substantially a transcript of the 29th of Charles 2^d. By both of these it is enacted that certain Classes of Contracts shall not support a Suit or action either at Law or in Equity "unless the agreement be reduced to writing or some note or memorandum of it signed by the party or his authorized agent."

The precise effect of this Stat^e is therefore to Stat^e 270
make

20th Nov. 1879 make writing and signing necessary to some contracts which if made would be good by parol

See page 37
vol 1.

But I would have warned me for all that the Stat. has merely introduced a new rule of evidence and it has merely made necessary a new mode of proof respecting the contracts contemplated by it.

When therefore the Deft. says (and they say, truly) that none of the contracts contemplated by the Stat. will support an action unless it is in writing, it is not to be understood that there is any defect in the nature of the contract but merely that there is a want of that proof of the contract which the Stat. requires. - He therefore the Deft. in answer to a bill instead of pleading the Stat. of Frauds, and perjured himself the contract, as said, Equity will enforce it even tho it be by parol. And the reason is that the Deft. by his admission of the contract waives his right to insist on the proof which the Stat. requires. The contract is still intrinsically good. The Stat. was made wholly for his (the Deft's) advantage, and if he has a mind to dispense with a provision made solely for his protection and benefit he may.

page 370.

Different kinds of Contracts Contemplated by the Stat. These contracts the Stat. declares void unless the agreement is in some written memorandum & it be signed by writing and signed

Signed by the party or his authorized agent. — — — — — Very

1st A promise by the Ex. or Adm^{to} to answer out of his own estate for a debt of the co. or ward.

2^d A promise by one person to answer for the debt, default or miscarriage of another.

3^d All Contracts or agreements in Consideration of Marriage. By this is not meant the marriage Contract itself.

4th All Contracts or Sales of Lands, tenements and hereditaments or any interest in or concerning them. The Contract here is meant Contracts for Sales, &c.

5th All Contracts by the terms of them not to be performed within one year from the time of making them.

There are also the Contracts contemplated by our Stat^s. The English Stat^s likewise include all Sales of Goods to the amount of £10 - 2^d Stat^s 03 unless the Goods or some part of them be delivered 7th Stat^s 14 and at the time of the Sale or unless the Consideration or some part of it be paid or unless something is given by the Purchaser as earnest to bind the bargain. With regard to Contracts respecting Land there is a difference between the English 3^d Stat^s 13 and our own. Under the English Stat^s for 4th Stat^s 186 nearly all parcel Leases were Considered as Leases 8th Stat^s 3.

at twice. except Leases for three years or less. re-
serving two thirds of the annual value by way
of rent. which were and still remain good as at
Law. Lease for a longer term than
three years not renewing $\frac{2}{3}$ of the annual value
are now considered Leases from year to year.

In Common Law there is no difference
between lease for any length. They are
all now except in writing &c. &c.

page 406. The English Stat. 11th of George 2nd gives
a definition of "Inhabitant of the Parish" for Pa-
rishes 370th not Leases. We have however no such Stat.

The object of the Stat. of Frauds may be
gathered from the preamble. It was to pre-
vent the introduction of parol proof to prove
the Contracts which were contemplated by the
Stat. and thus prevent fraud and perjury. &
the explanation of the object of the Stat. shows
the reason and propriety of its title.

Altho the several Sections of the Stat. are
however liable to qualifications.

II As to the Promises of Ex^{ors} and Adm^{rs}. It
has been said (tho I take it not to be Law) that
if the Ex^{or} has a settlement he is bound by his parol
promise notwithstanding the Stat. of Frauds and
Perjuries. It is said that the settlement is a Con-
sideration and therefore the Ex^{or} is bound by his
parol

"parol" promise But at Q. L. the "parol" prom-
 ise would not have been good without a consideration
 If then a consideration still renders the promise good
 the Stat^o has introduced no new rule on the subject,
 and is null and void But the real reason of the rule
 if there is any is that as the affairs have been trans-
 ferred to him, the Debt has also become a person-
 al obligation on him. But this is not so For he
 must still be said in his representative capacity
 as Ex^r, his person can never be taken nor his
 property, unless it be upon the ground of a personal debt
 supposed & warranted But if the Debt has become
 his own, he surely might be said in his own name
 The promise is therefore to pay the debt of the Ex-
 ecutor, and comes precisely within the purview of the
 Stat^o. And there is no division in support of the
 "dictum", that such a promise is good. The
 authorities all support the contrary doctrine.

It was once indeed held by Lord Thring that proof
 of affairs in the Ex^r's hands would subject him up to the
 Stat^o and implied promise to pay the Debt of the
 Executor. This would be introducing a rule more
 vague and uncertain extensive than any known at
 Q. L. And then the Ex^r could only be subjected
 by a verbal promise But this rule of Lord Thring
 has since been overruled

It was once held and that in the time of
 Lord Mansfield, that a submission to arbitration

1846th 912
 5th 2^o 0
 7th 2^o 453
 was an implied admission of assets to pay the debt
 and prevents a plea of want of assets afterwards.
 This has however with justice been some over
 ruled. For the Ex^{or} may with his ^{the} reasonable method
 to ascertain whether there is a just debt and
 what is the amount of it

1846th 453
 page 143
 It seems however to be settled that if upon
 Submission the arbitrator awards that the Ex^{or}
 shall pay a certain sum he is estopped from
 afterwards saying he has not assets to that a-
 mount. For a legal award supposes assets
 to the amount of the award to have been found by
 the arbitrator, and this presumption cannot be
 rebutted. It is the same as a Jdg^t of a Court
 to pay that sum

1846th 8
 It was once held that the payment of an
 interest was admission of assets to the amount of
 the principal. But this decision has been since
 very justly overruled. For say there is only debt
 to be 1000 Dollars the interest on it 00 and the
 assets 00. Now the Ex^{or} may be compelled to
 pay the 00 Dollars, and if he does pay it he ad-
 mits he has assets to the amount of 1000 Dollars
 the principal!!

Chitty 823,
 2^o 112
 1863 622
 3 Wilkes 1
 3 Sug^r 1200
 Barr 1228
 The acceptance of a bill of Exchange by
 the Ex^{or} of the Drawee is however an admission
 of assets to the amount of the Bill and the Ex^{or}
 must pay it. For by accepting the bill he be-
 comes a party to it and every party to a Bill of
 Ex^{ch}

Exchange, is bound by, it by the *Lex Mercatoria*. 1st Ed. 487.

And upon the same principle the transfer of a Note or Bill of Exchange by the Ex. or Ac. Chitty 111 is evidenced and admission of a debt to the amount D. 2 112

For at the time of the transfer he is supposed to receive an equivalent for the Note or Bill 2d Ed. 1200 which is a debt. And besides he holds himself out as a party to the bill, and is therefore liable by the *Lex Mercatoria*.

These rules respecting the promises made by Ex., who have and who have not a debt, may not at first seem relevant to the subject under consideration. But you must recollect that the Statute 7 Geo. 4th c. 35th note that makes no promises good when reduced to writing but what were good at Common Law 1200

But at Common Law no paid Contract was good without a consideration, nor was a promise by an Ex. good without a debt. The same rule therefore holds as to the Contracts which I am considering when reduced to writing, under the Statute.

This is a Cardinal rule not only respecting the Contracts of Ex., but also respecting all other Contracts Contemplated by the Statute that they are not binding when reduced to writing, unless they would at Common Law have been binding if by Parol. And it has lately been determined by the Ch. of the Ex. that the Consideration must appear upon the Contract 207

Contract itself - For the words of the Stat are that the agreement must be in writing, and the consideration is part of the agreement

Whether this latter rule applies to our Stat is doubtful. For here many writings tho' not under Seal are treated as specialties. And if this is the case with Contracts under the Stat, no Consideration need appear. Arguably, i.e. this opinion was a decision of the Sup^{re} Ct in Fairfax County that no Consideration need appear on the Contract.

In order to take advantage of the Stat the Ex^{or} or Adm^{or} must have been so at the time the promise was made. Bakitt has been determined that a promise that he would do Article 330 name a certain sum in Consideration that he should afterwards be appointed Adm^{or}, was good tho' a part only. For there was a sufficient Consideration, and the promise was not within the Stat.

In relying upon a promise of an Ex^{or} Robert, 2050 which is good under the Stat, the Plff need not aver a gift. For the Ex^{or} is here liable "to bona propriis" - and can be liable no other way.

For the purpose of subjecting the Ex^{or} and Article 2002 upon his promise there must have been a 2 London 130 debt of the deceased at the time of the promise Law 107 for which the Ex^{or} or Adm^{or}, as such was bound to the

the time. For he is not bound unless he would have
been by a parol contract of the same nature at C
said

* Regue an Ex
out is not bound
on his promise to
pay a debt if he did
take bound by the
Stat. limitations
page 333-6

II The second class of cases contemplated by the
Stat. of Grand. are the promises of one person to an-
swer for the debt default or mismanagement of another.

The Stat. requires these to be in writing and signed
by the party.

Ed Ray 1087
1 W. W. 300
3 Jan 1888
Baird 227
Ex Dig 101
Do 102

On this head there is this general
distinction. If the promise is such an one as in the
Books is called original it is binding tho by parol
but if it be such as is termed collateral it must
be in writing. All the promises contemplated
by the same clause of the Stat. are of this latter
class.

In the rule as I have laid it down I wish
to leave no mistake made. I say that an orig-
inal promise for the benefit of a third person is good
even if by parol; for no promise to answer for the
debt default or mismanagement of another is original.

The Stat. has no such sayg nothing about orig-
inal or collateral. But all promises to answer
for the debt of another are collateral and an
original promise is therefore never within the pa-
rison of the Stat.

When there is a promise said to be origi-
al and when collateral.

1st A promise
is said to be original when the third person for
whose benefit the promise is made is not liable
at all to the promisee. So that he is not bound at
all

3d Ed 208
Tribut 236
2216-3223
3d Ed 80
2 W. W. 34
1 Do 300
all

2d Reg 1085-5 all by the Contract &c. A further promise
 13th Feb 1881 to B for the benefit of C there being no debt
 14th Feb 1881 due from C to B this is an original promise and
 15th Feb 1881 does not therefore come within the Stat. There is
 16th Feb 1881 no debt due by the Supposition and it is not a
 17th Feb 1881 promise to answer for the default or mismanagement
 18th Feb 1881 of another. 2d A promise by one for the benefit
 19th Feb 1881 of another is original when upon the promise the
 20th Feb 1881 liability of the third person is extinguished. 3d
 21st Feb 1881 A promise in consideration that the debt
 22nd Feb 1881 of a third person be discharged; the promise tho
 23rd Feb 1881 by parole binds me not being within the Stat.

Authorities
 See, Law

See Vol 3. 60

This rule has been doubted but I think it is
 settled Law.

Authorities
 Supra

3d The promise is said to be original
 when there is a new consideration arising out of a
 new and distinct transaction, and moving to the
 promisee; so that the Debt is only the measure of
 what is to be paid for another object. In these
 three cases they being original promises are bind-
 ing by parole.

Authorities
 Supra

On the other hand if the promise is made
 in aid of a subsisting and continuing liability of
 the third person, so to procure Credit to him it is
 collateral and so within the Stat. Or in other
 words when the promise is intended merely to fur-
 nish an additional remedy to the creditor it
 must be in writing.

The first

The first class of original promises. A Sargt. to B. deliver goods from you & then to S. and — charge them to me. This is an original promise and binding the obligor; for S. is never liable. The charge must be made to A in the first place. So if the words are "deliver S. goods on my account" the promise here likewise is original. So if the words are "deliver goods to S. and I will pay you" In all these cases it is manifest that the charge is to be made to the promisor.

25th Dec 81
186th Dec 120
20th Dec 108
20th Dec 209
22nd Dec 210

On the other hand if A says to B requesting him to deliver goods to B and charge them to him and if he B does not pay you I will: this is a collateral promise and does not bind me unless in writing. It is merely, in aid of the liability of B and to furnish an additional remedy to the creditor. Again if I say "deliver goods to B and if he does not pay you I will" — this is clearly a collateral promise. It is merely a promise to pay B's debt and so plainly within the Statute.

186th Dec 120
20th Dec 108
20th Dec 209
22nd Dec 210

To also show an Officer in the Army appointed to a post to supply his mother in law with bread during his absence saying "he would see her paid" the Act sets this a collateral promise. The opinion upon which the Judges went in that decision was that the mother was chargeable in the first place; and if this was so, the decision was undoubtedly correct.

25th Dec 81-2
20th Dec 209
20th Dec 210
22nd Dec 210
20th Dec 108
20th Dec 209
22nd Dec 210

H. St. John

It strikes my mind that the distinction made
 25 Dec 81 by Lockman as to this rule was just. He
 said that if the promise be before the delivery
 it was original but if after collateral.

When however the promise is "I will see
 you paid" the Ct considers itself at liberty to en-
 27 Dec 1881 gine into all the circumstances attending the
 212 promise in order to discover whether it was the
 228 understanding of the parties that the promisor
 should be made liable in the first place.

Thus when an officer purchased clothes for
 his sister saying I will see you paid at the
 pay table the Ct enquired into the amount he
 is now to recover whether the officer meant to
 charge himself. But suppose a card. A
 says to B. Give good to C who is about to be
 removed. Give the labor on three months credit
 and I will see you paid. There then can be no
 doubt but that the promise would be considered
 original.

Again John Stiles wants goods. A
 doesn't like to trust him. B says to A if you don't
 25 Dec 80 know John Stiles you know me. Let him have
 212 the goods and if he don't pay you I will
 210-11 pay him. This was held a collateral promise for the inten-
 tion of the parties clearly was that the charge
 should be made to John Stiles.

It is a good rule that a promise that a third
 219-32 person shall do an act for not doing which he is
 1885 liable is not binding.

third person is liable, is collateral. Thus A. promises by A that B shall return a horse - which he hires of C. is collateral. This is clearly a promise to answer for the default of a worker and therefore within the Stat^e

Hobbs Ch. 500
3 Salk^o 15
1 Salk^o 27.
6 Mod^o 248

But the promise to be within the rule must be to become liable on the non performance of an act which the third person is bound to perform.

But if A hires a horse and promises that B shall return him, the promise is original and binding tho not in writing. So if A hires a horse of B and promises that C shall pay B a sum of money, and if C does not that he will pay it himself. C not being privy to the transaction the promise is original. If A buys a horse of B, and promises that C who owes him 100 Dols shall pay it to B, C not knowing of the transaction the promise is good tho payable.

Roberts 223
Lilly gibbs 302

Further. To make the promise collateral the party for whose benefit it is made must not only be liable, but he must be over come. So at the time the promise is made. And if he is not liable at the time or if he does not then become. So the promise is original tho he afterwards assumes the liability.

20 Ray 1085
Robt. 217
D^o 22232

If a promise is made by one of several persons to pay a debt for which they are severally liable the promise is original. It is a promise to pay.

5 Mod^o 215
Combs 302
2 East 325

5th Nov 1813
 2nd Nov 1814
 pay a Debt for which he is himself liable, and which may be collected of him. It is not therefore within the Stat. Thus a Promise pending a Suit agt. two debtors by one of them to pay the costs that have arisen in the Suit is original & binding.

When the Promise is original the Common action of *Tractatus Causam* is the proper one. This rule is meant to apply to those Cases under the second clause of the Stat. If however the Promise is collateral, the action must be *Special* stating the whole Case.

I observed under the second head of original Promises, that when the liability of the original Debtor is extinguished by the Promise of another this Promise is original. Here the Promise is not in aid of a continuing liability of a third Person e.g. A says to B "I will pay the amount you hold agt. J. S. and I will pay the amount of it." This is an original Promise. — There has been some question about this rule and "Roberts" doubts it. It seems to me the rule is correct. Is this a Promise to pay the Debt of J. S.? No — the very condition of the Promise is that the debt of J. S. be discharged, and until the debt is discharged the Promise is nothing. — The debt is merely a measure of the amount to be received upon the Promise.

Again: when upon the Promise of a Debt

by one person the purchaser promises the Seller to pay him the amount of the debt. It is 18 East 136 an original promise. It is not a promise in 2 East 325 and of the Security of the creditor. In short it is merely a purchase of a Chose in action which held other property may be sold. The Statute of Frauds and Pleas has nothing to do with it.

The third class of Cases where the promise is original, is as I have observed, where there is a new Consideration arising out of a new and distinct transaction and moving to the promisee so that the debt is only the measure of what is to be paid for another object.

The case of "Williams and Riefel" is a leading one on this Subject. Where the Landlord came 3rd Jan 1889, where the Land of his Tenant to diminish his rent. 3 East 80.

As to what the goods upon which the Landlord 232 owed had been assigned. Promised to pay the rent such 25 in consideration that the Landlord would not do so Ray 759. Where the Landlord abandoned the distress and 3 East 325 sued A on the promise. This promise was held to be original, by all the Judges & Bench.

Here the debt still remained against the Tenant and therefore one might at first suppose the promise collateral. But this promise was founded on a new transaction, and was made in consideration of the Landlord giving up his lien upon the goods. In fact it was a new sale.

of the use upon the good. Which was a sufficient consideration. The Statute has nothing to do with it. Cases of this kind have not been classed in the Books, but the definition which I have given will I think include them all.

But is not the promise in the above case a promise to pay another's debt? It is to be sure a promise to pay rent due from a third person. But then it may be considered merely a purchase of the Landlord's lien.

Miscellaneous Rules

1st promise by one person to pay a sum of money in consideration that the promisee will withdraw a suit of assault and Battery or other trespass ag^t a third person is original.

Wilson 308
7 T. R. 204
2 Day 357
Saunders 457

And it is not a promise to answer for the Debt of another. As the action is one sounding in tort, there is certainly no debt. And there is no default or misfeasance in the third person or if there is it cannot appear in an action on this promise, and the maxim of Law is, that "non parentibus de non existentibus eadem extractio". And besides this promise does not raise the same duty as the battery, supposing the battery proved. The person committing the battery was not liable to pay the price said promised by the promisee. The promise is not then to answer the duty of a third person.

But to

But to make any promise to answer the debt be of another Collateral. then must be at the time a debt or duty owed by the third person and ascertained or capable of being ascertained by some known and certain standard. On this ground the case of the Battery as before mentioned may be determined. For there is no standard by which the damage of a battery can be measured.

On the other hand a promise to pay a sum of money in consideration that the plaintiff stay an action of Debt or action on a contract 2 Willow 942 agt. C. is Collateral. For here the Debt owed by C may be ascertained by referring to the contract e.g. if the suit be for goods sold upon an implied promise to pay what they are worth the value of the goods will be the measure of the debt or duty.

This rule I would here remark & suppose the Debt not discharged by the promise. - So it has been decided by the Ct of Errors in Conn. and I think correctly that a promise in consideration of forbearing an action of Trover agt. a third person to pay the damage was Collateral 2 Day 455.

Here the duty of the third person might at the time of the promise have been ascertained and the promise was to pay the same debt, which the third person was bound to pay. It was therefore a promise to answer another debt. I leave -

I have observed that a Promise to pay money in Consideration of staying a Suit upon a Contract is Collateral. But I think a Promise to pay the debt of a third person in Consideration of the release of a Suit against him would be original. I know of no decision on this subject. But by the English Practice a release is a release effectually of the right of action, and so an discharge of a debt. Thus then you fall under the head respecting the extinguishment of a Debt. But in Conn a Promise by a third person in Consideration of a release must be considered a Collateral one. For here the Suit may be immediately recommenced.

So I apprehend that the Promise of a third person to pay, I's debt in Consideration that he be released when taken on mainer process is Collateral, For the release is no discharge of the debt, but I may be immediately retaken. It is merely a promise in aid of a Subsisting and Continuing liability of I's. I know of no Case of the kind.

Analogy,
4th Dec 3482

18th Dec 557
6th Do 525
7th Do 421
- Cont'd -
18th Dec 57.

On the other hand if the arrest had been on final process I conclude the Promise would have been original. For the debt would have been discharged by the release of I's.

There was formerly a Case of this kind in this State. The Father of a person arrested for Theft

with -

without a warrant promised to pay the value of the thing stolen upon consideration of his sons discharge. This promise was said to be within the Stat. upon which the decision was grounded I don't know. It was certainly not a promise to pay the debt of another. Nor was it to answer the default or misdoings of another. For then it would have been to absolve the event of the production, whereas it was actually to pay a sum of money. The promise was undoubtedly void at C. Law being a countenancing of felony.

There have been some opinions that where there arises a new consideration, and nothing more the case is out of the Stat. This is now how - Amb. 330
 we already settled the other way. And indeed such 2 B. & W. 1887
 a rule would entirely defeat the Stat. For a verbal promise before the Stat. would not have been 2 W. & W. 94
 good without a consideration. If then any new con- 2 B. & W. 281-2
 sideration made a verbal promise good the Stat. 78 E. 201
 would be nugatory. Rep. 232-3
 Q. - 239

I would here observe that a written promise to pay another's debt, if he does not pay it when due is discharged by the creditor forbearing the debt after the time. For here it is manifest the Debtor shall pay the debt if he can. & the creditor is to come upon the promise only in the event that he cannot, or after due diligence used collect it of the Debtor. 2 H. & W. 297
 No English
 authorities
 point out

It is to be observed as a settled rule that a judgment is not

judicial Confession of a paid promise to pay,
 where debt. he will take the promise out of
 the Stat. This shows that the Stat. merely
 introduces a new rule of evidence. Good & A. -
 238. You A. pleads a tender in bar to an action
 on a paid promise to pay another debt and
 excludes the necessity of proving the promise.
 The promise binds him. But if the Stat.
 vitiated the Contract itself the promise could not
 bind the promise notwithstanding the plea of
 tender.

Shoemaker 450 I would further observe that when the
 13th Dec 279 promise is by the Stat. required to be in writing
 30th Dec 1890 the Stat. does not say that it is in writing. It
 150. is sufficient if it appears in evidence.
 Dec. 202

Good & A. 289 The Stat. does not then alter the rule of
 pleading. This rule applies to all cases under
 12th Dec 540 the Stat. A demurrer then cannot be supported
 20th Dec 352 because the declaration does not allege the promise to
 18th Dec 77-8 have been in writing. A demurrer is therefore
 tantamount to a Confession that the promise was
 in writing. It is however doubtful whether this
 rule is applicable to our practice. If these
 promises in writing are considered specialties they
 must be set forth in the declaration.

Shoemaker 450 On the other hand if any collateral promise
 28th Dec 49 that comes under the Stat. is pleaded in bar to
 18th Dec 279 another action, it must be stated to be in writing.
 The only ^{reason} rule that I know of for the distinction is
 that

that more strictness is required in these than in declarations.

But altho it is not necessary to aver that the promise was in writing, yet you must always aver a sufficient consideration. For unless there is consideration the promise is not binding. 75 Rep 250 Roberts 202

And if part of an entire Contract is within the Stat, the whole is bad. e.g. A promised B to pay him a debt owed by C and likewise to deliver him a load of Corn: this is all bad. For the whole Contract must be declared on or the evidence will not support the declaration. 2 Vent 223 75 Rep 201 145 Rep 130 Annot. 205

III The third Class of Contracts Contemplated by the Stat and required to be in writing and signed are all Contracts or agreements in Consideration of Marriage. 68

The Stat does not include Contracts to marry; these are good tho not in writing. The Stat refers only to those Contracts made in Contemplation of marriage by way of Settlement &c. These in England are very common. Tho in this Country rare. 411 280 386 34 179 618

And tho we derive from "Devint" it was law down that the marriage Contract itself must be in writing; but this is clearly incorrect.

To this third Clause of the Stat there is no exception except in the case of a part performance.

Of this subject I shall treat hereafter. It was formerly doubted whether the agreement were good if by part would not be good if it was agreed to be. 281

The Act 402 be reduced to writing. But it is now clearly settled
 3 All^d 504 that it would not. It appears to me strange
 that this should ever be questioned: for in this way
 the Stat^e might always be evaded, by merely in-
 serting a clause that the Contract should be re-
 duced to writing.

If however there is such a stipulation that
 the Contract shall be reduced to writing, but the
 performance of it is prevented by the fraud of either
 12 All^d 518 party, a Ct of Equity will relieve and enforce the
 Contract. Thus they do not on the ground of it
 being out of the Stat^e. but in order to deter fraud
 and prevent fraud. And the proper way to re-
 lieve in this case is to enforce the Contract.

Thus if the intended Husband & promised to do
 it and his intended Wife contra Band and further
 promised to reduce the Contract to writing, never
 however intending to do it, the Ct will enforce the
 Contract as a gross fraud. And I apprehend the
 same would be done, were there no promise to re-
 duce the Contract to writing, if it could be proved
 that a fraud was intended from the beginning.

And a parcel promised before marriage is a
 2 Ves^{jr} 140 sufficient Consideration to support a Settlement
 1 Ves^{jr} 196 in pursuance of that promise made after mar-
 1 Roberts 197 riage. So it is a sufficient Consideration for a
 2 Co 200 children a quarter entered into after marriage.

And I would here observe that a Letter
 3 (2) 318 written by one of the Contracting parties is a Sufficient
 proof

Sufficient note or memorandum in writing to take the Contract out of the Stat. And this rule is equally applicable to all other Contracts entered into by, the Stat. as shown on account of marriage

But in such case it must appear that the other party accepted the offer in the Letter and acted in contemplation of it in consenting and proceeding to the marriage. So that when the father of the young Lady wrote a Letter to the Daughter stating to her the Settlement he wanted make on her She did not show the Letter to her intended Husband till after marriage when he brought an action upon it, and the Chancellor would not enforce the Contract, the Husband having never before marriage seen the writing, so that he could not have acted in contemplation of it

And it has been determined that a Letter to one's own Agent stating the terms on which he was to marry was a sufficient note or memorandum to take the Contract out of the Stat.

But the writing whatever it may be must furnish distinctly the terms of the agreement. Because if the leading terms of the Contract do not appear in the writing, as it cannot be proved by parol the Ct will not know what it was. This rule applies to all the classes of Cases under the Stat.

IV The fourth class of promises required by the Stat to be in writing, are Contracts and Sales of

of Lands, Tenements and Hereditaments be "Then have
 been some disputes respecting the word, "Lands
 Tenements and Hereditaments, and any interest in
 or concerning them" (i.e.) whether things attached
 to the Land were such an interest in so as would
 not pass by a "pawd agreement." In the
 18th Case the question was raised respecting the
 Sale of some timber by "pawd." It was held
 that the Contract was not within the Stat.
 The next question was, respecting some "pawd"
 growing and it was held, that it was such an in-
 terest as was within the Stat. Then again
 it was determined that "pawd" while growing
 would pass even by a "pawd agreement."

In 1809 our C. of Errors determined that
 the Stones running over of a Grist Mill were not
 an interest within the Stat.

It seems then that the produce of Lands
 may, according to the current of authorities, be
 sold by a "pawd agreement" even when growing.

I think however that the decision respecting
 the "pawd" was most agreeable to principle,
 and in case to take them out of the Stat. they
 must be considered chattel interests; but in other
 cases they are not so considered. Equity will not
 tie for instance for taking them. It is not felony
 to take them but merely a trespass.

It was formerly doubted as I have before
 seen whether a Statute in the "pawd" Con-
 tract

Contract that it should be reduced to writing would not take it out of the Stat. This was settled. That it would not, and it seems strange that it was was made a question. For the Statute could not have been proved without equal danger of fraud and proving the Contract itself.

14th 181
 No 157
 18th 45
 21st 555
 No 565

It has been here determined that a parole contract to pay money for Land that has been conveyed is not within the Stat. For a promise to pay money is not a contract to sell nor a sale of Land, or any interest in it. The intention of the Stat was merely to prevent a conveyance by parole. I don't know what this question was decided in England.

Book 77.8
 No 479

There has been another question raised which has been decided both ways. First it was held that a parole agreement by the Grantor at the time of the Sale to pay for the deficiency of the estimated quantity of Land was an agreement within the Stat. Afterwards, the Ct held that a similar oral Contract was not within the Stat.

14th 27
 Book 703

Again, in the Case of "Sherry and Northrop" the Ct held the promise not binding. But in this last Case there were Notes executed and the agreement was mutual that the Vendor should make up the deficiency if there was less Land than the estimated quantity, and that the Vendor should pay more for it if there was more Land.

1st May 28
 This.

This promise was not held within the Stat^t
 but it was void at Law. It was not a con-
 tract or sale of land &c. And I held that this last
 decision was correct. For the Notes were in wit-
 ness, and no verbal agreement to contradict is
~~to be~~ ^{to be} written will be allowed to be proved. So that if
 not analogous, I agreed to pay 1000 Dollars by a written agreement
 and the promisee verbally contracts to take 900
 his promise is not binding.

But notwithstanding the gen^l and broadness
 of the Stat^t, yet in some cases courts agreed
 on the sale of land he will be enforced
 the Stat^t notwithstanding. And here I would
 remark generally that such agreements are good
 if provable consistently with the spirit of the
 act and the rules of evidence. And this will
 remind you of the rule which I have before-
 said, that the Stat^t has merely introduced
 a new rule of evidence.

First, then, if there is no danger of fraud
 or paying in enforcing the contract the agree-
 ment is good. In the first example which
 I am about to mention there have been different
 opinions. The case is this. A filed a bill
 18 May 221 to enforce a parol contract. B confessed
 the agreement but insisted on the Stat^t.
 2dly 100 Whether B is bound or not is a question on
 3dly 138 which there are different opinions. I
 18 May 500
 2dly 508

I think he is, for there is no danger of fraud in
 proving the Contract, for it is admitted. "Powd." ^{Vol. 3rd 277}
 in defense of this rule takes one ground that I ^{contra analogy}
 think wholly indefensible. viz that this is not an
 exception to the Stat. for says he the Contract
 is by the Confession of the party, reduced to writ-
 ting, and no longer parole. But this going a greater
 way.

One thing however is clear notwithstanding
 the difference of opinion on the case which I
 have mentioned. That if the Deft confesses the
 Contract, and does not insist on the Stat. ^{2 Bro. C. 508}
 must be enforced. All the authorities agree ^{48 Sup. 23}
 that this is a correct rule. But if the Statute
 vitiates the Contract itself it could never be ^{Robt. 150}
 forced. ^{Q^o - 107}

It is also clear that if he confesses the
 Contract and submits to such a use as the Court ^{page 370}
 thinks proper to make, he is bound by the Contract. ⁴⁴⁸

And it seems that if the Deft alleges a
 written Contract, proof of a verbal one will support ^{supra}
 his declaration unless the Deft insists on the Stat. ^{Robt. 150}

If the Deft confesses the Contract but in-
 sists on the Stat. it was determined by Lord Hard-
 wicke that the Contract must be enforced. ^{3 M. B. 3}

Lord "Mansfield" approved of this decision. Mr. ^{2 Bro. C. 508}
 Lord "Macauliffe", and Lord "Mansfield" were of the ^{Robt. 208}
 same opinion. ^{Q^o - 234}

But in a case of Chief Justice Eyre ^{2 Bro. C. 508}
 this, ^{Robt. 150}

2 Vassall 28 held a contrary doctrine. And Ed. Rossin coincides
2 B. & C. 534 with him in opinion. Chief Baron Eyre gave the
same decision.

Stacy 588 The 11 Vidyff and 2 Browne Chiff are cited
2 B. & C. 534 agt. the doctrine for which I contend. That the
6 B. & C. 45 Chanceller & Thurlow's opinion was in my favour
That Contract was held not binding on another ground
viz, that it was void for uncertainty.

an ac 94/ It is however said "questio verata" "Roberts" says
Nov 3rd 27/ however that the question now seems to be nearly
settled. that such a Confession upon a bill does not pre-
vent the Deft from insisting upon the Stat.

1 H. & C. 108-20 Whether the Deft is bound to Confess or deny
2 B. & C. 500 the Contract when a bill is filed is a question abso-
lutely involved in the one I have been considering,
and of course there are contradictory opinions. Ed.
2 H. & C. 155 "Macclesfield" "Thurlow" and "Mansfield" think he is,
Rob. 1567
4 Vassall 34

On the new question whether a Confession up-
on a bill of the same Contract takes the argument
out of the Stat. Ed. Macclesfield Thurlow Hard-
wicke and Mansfield think it does.
Ed. Doughtborough Eyre and Ebbes are of a con-
trary opinion.

The language of Ed. Thurlow is that if the
Contract is paid the Stat. does not permit the
introduction of proof. No I would the Contract on the
Def't That the only intent of the Stat is not prevent
proving the Contract otherwise than by the Def't own Confession.
Justice

Justice "Eyre" says that the Deft. may be induced (if the rule be which I contend is admitted) to commit perjury in his answer. But the object of the Stat. was not to guard the morals of the Deft. but his property. And an answer in Chy. may, always hold out an inducement to commit perjury.

I observed that it is a question whether the Deft. must in his answer either confess or deny the parol agreement. If he must what is the reason of the rule if no use can be made of his confession. "Cui bono" is he compelled to confess or deny?

Iu think I think that the weight of authority is that his confession binds him altho I admit that some of the latest decisions have been the other way.

But whatever is the answer on the question which I have been considering, there are cases that undoubtedly fall within the rule laid down, that the Stat. does not contemplate cases where there is no danger of fraud or perjury in proving the Contract. e.g.

It is well settled that a parol Contract for the purchase of Land sold at Auction under the direction of a Master in Chy. by order of the Ct. is good and must be enforced. And the reason is that the Master being an officer of the Ct. acting under his oath of office, it is supposed there is no danger of fraud or perjury in proving the Contract. But if the Stat. rescind the Contract as if void. — this

Wing 218
D. — 220
1st ed. 289
2nd ed. 334
Roberts 110
Hawes 271
D. — 274

this would not be the case.

33rd Nov 334
34th Nov 115
Against and for the same reason we agree most respectfully a Subsequent Contract the offer to vendor, acting for the Mortgage and Mortgage was by Ed. Thornton, and the fact it was by him. In neither of the cases just mentioned would the Stat Case be an action. Why then should it be in the case of a Conveyance on a bill filed. The analogy of the cases is very strong and the same arguments which apply to them last two cases will apply to the other.

And according to several opinions the Stat Case of no decision. Finally in point a Parcel Contract respecting the Sale of Land if inferable from circumstantial facts is good if there is no danger of fraud or perjury in proving these facts.

And it is said that where there is apparently a Sale by an absolute Deed, and the Vendor gives an obligation for the purchase Money to the Vendor and remains in possession of the Land paying the taxes, but paying no rent the Court will presume that there was a Parcel Contract that the Vendor might receive if he advanced the purchase money. For all the facts except the absolute Deed are such as they would be if a Mortgage was intended. But none of them such as if an absolute Deed was intended to be given. There has been no precise case on this subject in England, but see -

This precise question arose in the case of -
Sanford and Washburn and was decided by the Supr

Sup^d Ct in Conn. agreeably to the rule just laid down But the Ct of Errors reversed the decision.

An agreement between the owner and an occupier of Land that each shall have one half of the produce is said to be good tho by parol. -

There has been no precise decision that I know of. The principle which seems to be established (that the growing crop is not an interest in Land) is Law, this rule wants reinforcement, be correct. But I apprehend it would be Law on another ground even now the crop considered an interest in Land For the question is never raised until the Contract is in part performed and then on this ground the agreement is good.

Thus far I have considered that class of exceptions to the rather qualifications of the Stat. 1794-6 and show there is no danger of fraud or perjury in proving the Contract. But there are other exceptions arising from the rule that are not to prevent fraud but to prevent such a construction as would encourage it.

It seems then to be a principle that when a party is not performing a parol agreement will be treated as fraud on the other & distinct from that which arises from a breach of Contract the agreement will be enforced. Hence if a Contract be partly or entirely performed by one party at the request or with the consent of the other it will be binding on the party who has not performed.

1803 Dec 397

1803 Dec 60

1804 Feb 172

1804 Mar 600

1804 May 221

30th 100

Aug 1783

3d Nov 1433

2d Dec 1435

Dec 3d 551

10 Bro. Ch. 417 e.g. A leased Land to B for 20 yrs. Now this Lease
 3 K. & J. p. 378 by the Stat. would be void. But if B enters on
 7 Q. 341 the Land and erects a House or makes other useful
 say improvements at his own expense. B may
 enforce the Contract in Ch. The Statute
 might take advantage of his own fraud. And it
 is by virtue of their jurisdiction over frauds that
 Ch. intervenes, and not by their power to enforce Con-
 tracts specifically. For this last branch of their
 power would not authorise them to enforce a Con-
 tract within the Stat. of Frauds.

Then if you will observe a material dif-
 ference between this case and one not partly per-
 formed. For if the Contract is not in part per-
 formed the parties remain in *"Statu quo"*, and nei-
 11 Bro. 339 ther has lost any thing by the Contract. —
 10 Bro. 132 Powell "Now treating of this subject observes that
 Q. 138. & 133, the acts done tend to prove the agreement, and
 therefore there is less danger of fraud in the proof.
 But it does not strike my mind that there is
 force in the argument. The acts done may be
 the sure evidence of some Contract, but the
 terms of it remain to be proved just as much
 as ever.

2 Bro. Ch. 48 And in the case of a part performance the
 3 K. & J. 523 Contract will be enforced tho' all the terms of it are
 10 Bro. 297 not precisely settled. It is sufficient that the
 leading points appear. And upon the question what
 11 Bro. 363 is a sufficient part performance, it has been de-
 Q. 485 termin'd.

ascertained, that a delivery of possession of Land by the Vendor is sufficient to take the Contract out of the Stat. You here the Vendor has lost possession and he cannot recover it without an action at Law. This wants put him to expense. He is not then in "Statu quo."

And taking possession under such parol agreement is sufficient notice to a third person who purchases afterwards for a valuable consideration.

So the payment of the whole or part of the consideration in money on a parol agreement for the purchase of Land takes the Contract out of the Stat.

But the payment of earnest money will not take the Contract out of the Stat. - This is not part performance but merely a form in making the Contract.

It has been made a question whether the receipt of money must not be acknowledged in writing in order to take the Contract out of the Stat.

It is strange that this question should ever have occurred. Yet such a receipt would itself be a note or memorandum of the Contract in writing. But it has been decided by Lord Hardwicke that it need not be in writing. "Powell" raised the question but decided in the same way.

And this agreement in part performed will be deemed and enforced as if the representations of the

Parc 309. the party who has not performed if he is himself dead.

But the act done must be such as in the
 08th Feb 45, as would prejudice the party claiming unless the
 7th Aug 34 Contract be refused. Hence a part performance
 18th Feb 138 and by one party will not entitle the other to
 Q^o 132 a decree. For the acts done are in his favor so
 that he does not suffer by the Contract.

And the acts done must be such as in the
 opinion of the Ct. would not have been done had
 with a view to the performance of the Contract.

3rd Aug 378 For otherwise it cannot appear that they were
 2d Feb 501 a part performance. Thus if there is an agree-
 3d Feb 4 ment between the Lessor and Lessee that the latter
 15th Feb 412 shall have a new lease after the expiration of the
 1st Feb 501 old one, and the Lessee continues in possession
 Parc 309 after the expiration of the term of the old lease
 this will not be considered such a part performance
 and his part as will entitle him to a new
 lease. For he might have held over as Tenant at
 Will had there been no new agreement to give a
 new lease.

I have already observed that the New
 18th Feb 175 lease delivering up possession is a sufficient part
 18th Feb 586 performance to entitle him to a decree. But
 18th Feb 412 sometimes a person has to do a conveyance
 3rd Aug 34 winding up and saving the Land are not a suffi-
 3rd Feb 379 cient part performance. There are some of the
 6th Feb 41 acts stipulated in the agreement to be done
 18th Feb 139.

and so they are not done in performance of the Contract. Robt. 140
Do 102

The act of marriage is not a part performance of the Contract made between the Parties P. 501 put in consideration of the marriage. See Sug 738 the Contract in consideration of marriage is not P. 618 to bind unless the marriage takes effect. At then Robt 190 the marriage itself was but a part performance Do 198 and of the Contract as to take it out of the Stat. these Contracts in consideration of marriage would be precisely as at Com. Law.

But it seems that a part Contract in consideration of marriage between A and B by a third person is taken out of the Stat. if A and B, intermarry with the consent of the third person. As if the Father of the intended husband agrees to make a settlement if the marriage takes effect he is bound by his agreement if they marry. And otherwise the Wife or third person who is a stranger to the Contract would be defrauded if the married in contemplation of the settlement. And it is a general rule that if the non performance of a Contract would be paid a third person it must be enforced. And so on the other hand if the performance of the Contract would defraud a third person it is void and cannot be enforced; it is an illegal Contract.

"Dart O" gives an example of part performance which does not come within the rule.

The Wife was allowed after marriage to take
 the interest of the Sum agreed before marriage
 to be settled on her. The Ch^o found a^d performed
 Wisley 397 a^d of the agreement. But it was not on
 18 Feb 304 the ground of a part performance. For if there
 was one it was on the husband's side, and so
 would not furnish ground for a^d in fa
 our of the Wife. The decision in that case
 was on a different general ground viz that the
 defence was not sufficient.

18 Feb 304 And the cutting down of timber in par
 Swane of the agreement when Land agreed
 to be settled. has been held a good part per
 formance. The Court then have been in this
 point that I consider contradictory decisions.

The Ch^o said that a^d performance is
 24 Feb 399 part performance on one side took the case
 24 Feb 399 out of the Stat. Afterwards they held that
 the payment of money in pursuance of a paid
 purchase of Land made no difference with the
 Contract. And again afterwards that it took
 the Contract out of the Stat.

And it is to be seen that even a written
 30 Nov 389 agreement may be contradicted by proving a
 18 Nov 1820 parol agreement which shows fraud in the
 2. Nov 203 execution of the written one (e.g. A and B.
 18 Feb 423 agreed that A should execute a Mortgage by
 18 Feb 294 giving an absolute Deed to B and taking from
 him

him and deceased. After B got the Deed he is
 said to execute the deed to A. The C
 now is the parol contract to be proved.

And further a parol contract respecting the
 sale of land may always be proved when it is only
 inducement to fraud. Here the parol contract
 must be proved to show how the fraud originated. 2 Day 331.

Thus in the case of "Honor and Buckley" the con-
 tract was made with an intent to cheat the
 owner out of his whole interest. The contract
 was carried into execution. And the C permits
 the parol agreement to be proved to show
 the fraud.

So a parol agreement may be pro-
 ved to show a mistake in the execution of the
 written contract. As if A agreed to convey
 100 acres of land and by mistake executed a con-
 veyance for 1000 - here he may prove the parol
 agreement. And this is not agt the Statute
 for the words of the Statute are "no suit shall be
 maintained &c". Now this is not maintaining
 a suit upon a parol agreement, but merely
 proving it by way of defence agt a mistake.

And it is settled rule in Equity that a writ-
 ten agreement of any kind may be controverted
 by the introduction of a parol one to rebut
 an equity. This rule is entirely unknown in
 the C & C. It applies exclusively to the
 D of E. Vol 4 page 375 2 Day 299 11th 2/4.

Novel 294. Debt and not to the Df. By rebutting an equity is meant refuting merely an equitable claim. This rule does not go upon the ground that a parol agreement can contain a written one, but merely admits it to show that the Df is claiming contrary to equity. It is a kind of guide to the Chancellor's Conscience. And still the written Contract is not destroyed, but may be recovered on at Law.

And now I will suggest an observation respecting the last two rules viz that the Cases under either of them fall within the letter or the Spirit of the Stat.

In the first Case the action is not maintained on the verbal promise for the Supp. Sided that was merely inducement to, &c.

In the other Case it cannot certainly be said that permitting a person to prove a verbal agreement to rebut an equity is maintaining an action on a verbal promise.

In England by the Stat 11 George 2^d an action of Trover is allowed, &c. may be maintained on a parol lease of Land for the use and improvement and this whatever be the length of the lease. We have no such Statute. The action will lie on a "quantum valebat" Supp. and it makes a parol lease of Land to B for five years. B occupies the Land and refuses to pay.

8th Dec 1832

20th Dec 1832

18th Dec 378

11th Dec 314

1st Dec 325

Page 432

pay the rent. Here an action on the Lease will not lie. But it may bring an action of Debt (debtum) or Sumptus and good evidence the past Lease, as presumptive evidence of the annual value. But this presumption may be rebutted.

But at Com Law the action of Treble Damages "assumpsit" would not lie and this is said the Stat. must be. Hutton 314
Doug. 234
Esp. Dig. 20

Altho. we have no Stat. like the 11th Geo. 2nd, yet our Old. will sustain actions like those laid under the 11 Geo. 2nd. They consider that Stat. Com Law here.

V Contracts of the fifth kind contemplated by the Stat. are "Such as are not to be performed within one year from the time of making. As if A by prom. promise to pay B. a sum of money, two years hence the time of making the promise; this promise is not good is not binding. The object of this clause is to prevent fraud or paying from lapse of time.

But this clause is held not to extend to any Contracts respecting Land. And the reason I conclude is that the other clause which relates exclusively to them, is supposed to contain all the regulations on that subject. Went 159
Rous 270
8 Telf. 337

And besides if the Stat. should say that all Contracts by parol respecting Land to which were not

not to be performed within one year should not be binding the inference would be that all others would

Salko 280

W.D. 280

May 300

3 Salko 9

May 310

Do 317

Do 373

To the construction of this clause of the Stat^o it is held that if the performance is to take place upon a Contingent event which may or may not take place within a year the Contract is not within the Stat^o. For the Stat^o only comprehends those cases where by the terms of the Contract it cannot be performed within a year.

Shinn 353

Do 370

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A promise to pay a sum of money at his marriage is good, altho the event may not take place till after the expiration of a year. So a promise to pay a sum of money on the death of a third person is good. So also a promise to leave one a sum of money by Will is not within the Stat^o. For the promise may die within a year.

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And in those cases where the promise depends upon a Contingency it is not necessary that the Contingency happen within a year. For the Contract if good at all is good "ab initio". If good it will not be deemed void and "void & void".

Do 187

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And even as to those Contracts struck by the terms of them are not to be performed within a year our Sup^o Ct have held that if the consideration

Do 187

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is continuing and running it will be good if pro-
formable within one year from the time when the
consideration is completed. But I think this
is somewhat questionable. I do not see how the
Stat^e can have such a construction as to exclude
these cases from its operation. I doubt whether
the question will receive the same decision be-
fore the Ct of Things Done.

I have now to mention some rules applicable
to all the classes of cases contemplated by the Stat^e

Under this head I would observe that the con-
struction of the Stat^e is the same in Ct of Equity 3 B. & P. 430-1
as in Ct of Law. The intention of the Legislature 4 B. & P. 32
and in both cases must govern, so that a con-
tract not binding because within the Stat^e at
Law is not binding in Equity. The remedy in
the two Cts is different.

Under this head our inquiry has arisen as
to what is an agreement or note or memorandum
of it in writing. With regard to this I suppose
that any writing intended by the parties to fur-
nish evidence of the contract is a sufficient note
or memorandum of it, in writing within the Stat^e.

What is meant by a written agreement is well
understood. It is an agreement expressing the
terms of it in writing. But a note or memoran-
dum must mean something else. It is not the
agreement itself. Hence as has been laid down

1 B. & P. 179

3 Atk. 503.

2 B. & P. 32

3 D. 318

a Letter expressing the terms of the Contract is an agreement or note or memorandum of the agreement within the Stat.

So it has been held that a Letter written to one's own agent is a sufficient note or memorandum in writing. tho it can not be considered the Contract itself.

And when upon the instrument which is the agreement note or memorandum the terms are not all certain yet it is sufficient if they can be made so by other documents or referred to. See *Smith v. Jones* 318, *See Smith v. Jones* 318, *See Smith v. Jones* 318.

As Suppose the agreement be to sell Land described in a certain Deed. This is a sufficient agreement. note be to take the Contract out of the Stat. And the terms be may be ascertained by referring to the Deed. Or if the agreement in writing be to sell a piece of Land at a price which I formerly gave for it. This is sufficient.

But when the written agreement who be referred to something extrinsic, and by the thing referred to the terms of the agreement are not rendered certain the terms cannot be proved by any other extrinsic parol evidence. Thus if I agreed to convey to B Land described in such a Deed as is referred to the Deed it appears there is no description. This agreement is bad and no parol evidence will be permitted to substantiate it.

And

And a printed agreement or one written by one of the parties containing the terms of the Contract is a sufficient note to be within the Stat.

1 Phill. 384
3 Binn 1821

I have already observed that the Consideration as well as the Stipulation must be in writing. This note does not however hold as to one class of Cases. Contemplated by the English Stat. 6 Geo. 3^d c. 25 is to the Case of Goods sold over the value of £10. Note 117

The reason of the distinction is that the last Stat. 10 clause of the English Stat. does not mention the word "agreement". The other clause is and by the word agreement is supposed to be meant the Consideration as well as the Stipulation.

And an instrument intended by the parties as a Deed but failing to operate as such by the omission of some requisite or a change in the circumstances of the parties will nevertheless be considered as an agreement and given in evidence to enforce the Contract. Eg. In the Stat. an instrument is drawn purporting to be a Deed but is not witnessed, nor acknowledged by the parties. This will be considered an executory agreement to Convey and enforced in Ch. So in England a bond to convey given by the Husband to the Wife before marriage tho' said as a bond will be considered in Ch. a sufficient note of an agreement to Convey and to take it out of the Stat.

2 P. Wms 242
Robt. 109

But

But the agreement to be effective, must be in
 1 M^o 477 put the parties and a book of both parties, So as
 2 M^o 109 entrance in the Steward's book of an agreement by
 the Lord to come to a Court is not a memorandum
 and within the Stat.

But the Stat^e requires the agreement to be
 1 M^o 118 signed by the party or his agent. And under
 1 M^o 118 this has been determined as in Davis's
 3 M^o 583 that not only the name of the party at the last
 1 M^o 283 end of the writing is a signing, but that it is
 1 M^o 399 sufficient if it is found in any other part of the
 9 M^o 249 instrument, if it was intended to give authen-
 1 M^o 288 ticity to the writing. Thus if upon a negotiation
 for a sale the agreement is "I, A B agreed to con-
 vey &c" - this is considered a sufficient signing.
 But here it is supposed the name was written
 by the party himself.

But it is otherwise if the name is not
 1 M^o 1667 intended to give authenticity but merely to explain
 1 M^o 121 the stipulations. In this case it is not a suf-
 1 M^o 288 ficient signing. e.g. "This writing witnesseth that
 A B agreed &c" here is no sufficient signing.

Formerly it was held that any alteration in
 1 M^o 121 the draft made by the party was a sufficient sign-
 1 M^o 100 ing. This is now overruled. And it could now be
 1 M^o 770 considered law I don't know. For surely nothing can
 be of other force as signing.

But signing in

But signing an instrument as witness the party
by signing knowing the contents is a sufficient note
he is willing to bind that person to all the stip-
ulations on his part written in the agreement

Widow 61
W. B. 318
Robt. 123

Thus when, marriage articles between A and B, in
which the mother of B, was to advance £1000,
portioned and the mother was a subscribing witness
it was held that this was a signing to bind the
mother. For her name was intended to give
authenticity to the writing.

And it is sufficient if the party who
shows the agreement is sought to be enforced
has himself signed if there is evidence of the assent
of the other party. But this assent must be shown
or it does not appear that there was any contract.

Robt. 564
Widow 351
W. B. 373
Robt. 20
Do 32
Widow 205

Thus when A sees the instrument and pro-
cures B to sign the contract was enforced agt. B tho'
A has not himself signed

It was some opinion held that A
who procures B to sign is himself bound. For
it is said that it is a signing by A's procure-
ment, which is the same as a signing by A.
But B has not signed as the agent of A. He signs
for himself. And I doubt whether the rule can
be considered law altho I know of no contradictory
decision.

Robt. 1621
Robt. 287

But if the party who does not sign brings
a bill for a specific performance he is then bound
for it is said that he thus recognizes and virtually
affirms

Widow 82
Robt. 124

affirms the agreement as to himself and in this
I see nothing unreasonable

Whit. 399
2 Buss. 1021 It is held by many as a General
3 Buss. 280 rule that the auctioneer of a Public Sale sub-
4 Wils. 244 scribing the highest bidder name to the Conditions
of Sale is a Sufficient Signing of the note or mem-
orandum in writing. And it is said he acts as the
agent of both parties. Others hold that this rule
8 T. Rep. 151 applies merely to one class of Cases where there is a
10 T. Rep. 107 Sale of Goods of more than £10 value. There are
13 B. & P. 300 respectable and late decisions on both sides.
14 Wils. 344

According to some opinions stated at Public
Whit. 280 Auctions were not contemplated by the Statute
even the Subject of them may be. But this will
hardly be considered Law at the present day.

And a printed name may be and in many
Cases is a Sufficient Signature within the Statute.
Whit. 238 As if a trader has printed bills with his Signa-
Rob. 124 ture and delivers them out. Then the Printing
is by his procurement and delivering them out
is acknowledging them his own.

3 Mod. 427 And tho' it is necessary that the Signature
Whit. 237 should be in writing. yet it is not necessary that
Kin. Abn. the authority of the agent who signs should be in
2 Ld. Contract writing. This may be proved by parol.
He 45

Further the intended Contract stated in
3 B. & P. 318 the bill or declaration need not be in writing.
And

and Signed. It then is another note or memo - Roberts 131
 reasons of the Contract signed and in writing
 it is sufficient.

But the mere writing the agreement with R. W. 770
 and own hand is not sufficient without sign Roberts 131.
 ing the name.

Interpretation of Contracts

It is law to be observed that the object of interpretation is to find out the intention of the parties, - and when this is discovered the Contract however expressed can be construed to extend no farther.

Thus if A says I will give to B what I wish to pay him £10 per annum. he B may distinguish for it upon the Law of A. B cannot in this case sue A for what, nor can he maintain any action against him, as for a Debt. There is no debt or promise to pay, which will support an action. It is not an annuity. The Dow creates merely a rent charge on the Land of A. This was clearly the intent of the parties, and the A cannot make a Contract for them.

But on the other hand the Contract must be carried to the full extent of the intention of the parties if the terms of the Contract will admit. Thus when A creates a trust to raise a sum of money out of the profits of his Land and give it to his children that the trustee might sell them if the money could not be raised from the profits.

With regard to the meaning of the terms used in a Contract the same rule holds as in the construction of Laws. Words are to be understood in their most ordinary signification, unless there are substantial reasons to the contrary.

Thus it has been held that if A sells to B 20 barrels of wheat, the barrels do not themselves pass, but merely the wheat. But this is not invariably held. Suppose A lived in England and B, in America. it would never be thought that the barrels were to be returned. So if A sells a hog's head of rum the hog's head will undoubtedly pass by the sale. The great custom in these cases governs.

If A leases to B for twelve months, the lease will hold only for 48 weeks. But if the lease were for a twelvemonth, he would hold for a year. For such is the meaning usually attached to these words.

Words expressing quantity, are construed as they are generally understood where the contract is made. *Shepherd 172, Do. Wms 690.*

Thus in England the word bushels expressed different quantities, in different Counties. According to the rule must be understood the quantity in that County where the Contract was made. But I think this rule would not hold when the Contract was to be performed in another County. For in Contracts respecting money the denominations of it are always to be understood according to that rate where the Contract is to be performed. And I see no reason why this rule should not hold, as to others words expressing quantity.

If the language is ambiguous the intention of the parties may be implied from the subject of the Contract, the effect and the circumstances. *Co. L. 428, Co. L. 242, Sugr 400, Stannard*

3rd Rep^s 581b Circumstances under which it was made.
 4th Rep^s 519. Thus if in a Grant the Grantor covenants for the
 4th Rep^s 80. quiet possession of the Grantee this is not to be
 understood as a Covenant to prevent riotous & dis-
 turbanes. But it merely warrants the right of
 peaceable possession to the Grantee. This is the
 manifest intention of the parties.

And it has been determined that the Grant
 of a freehold a man's farm does not convey the
 4th Rep^s 378. fruit-trees in his garden and orchard if there are
 other trees for the Grant to operate upon. But
 if there were no other trees the rule would in-
 doubtably be different.

And for the purpose of giving effect to the
 Contract and preventing fraud being entirely in-
 4th Rep^s 187. operative it may be understood as being one of
 3rd Rep^s 90. a different kind and of another species.
 6th Rep^s 332. Thus if one Tenant makes a Covenant
 5th Rep^s 574. to the other this instrument is to operate as
 1st Rep^s 480. a release and may be pleaded as such. For as
 a Covenant it has no operation. So also a
 Covenant by a Creditor never to sue a Debtor
 will operate as a discharge. For considered as a Co-
 venant it does not defeat the Creditor's right of
 recovery, but merely gives the Debtor a right to
 recover back.

And it is a general rule that if the
 3rd Rep^s 135. Construction of the words answering to this rule is
 necessary.

ordinarily ^{signification} renders the contract ineffective or void. See Ely 265
 but a different construction may be put on them. See 2 M.

It is a settlement of Real Property, words of Con- 1 Kent 202
 dition are used and there is a remainder over they
 are construed as words of limitation and not Con-
 dition. See examples in Title of Real Property.

And if an annuity be granted for services
 to be done the grant is Conditional tho' not so ex- 14
 pressed. As if A grants to B an annuity for 100
 ten years in consideration of certain services. Thus
 altho' the grant be absolute and in the present
 tense by words, it will be construed as Conditional
 upon the performance of the services. 383

Again if A grants an annuity to B
 "pro conditio suspensiva" the course shall be un-
 derstood to refer to the professional course of the 388
 grantor. This is an instance where the cir-
 cumstances of the parties are to be considered in
 the interpretation of the contract.

Upon a Scintilla premised where one holds goods 705
 in his own right and also in right of another and 335-02
 grants all his goods then held in his own right 3 M. 278
 alone. 100

And there is a remarkable class of Cases
 under the head of written releases. It is a gen- 170
 rule that when there is a recital of a particular 170
 claim in the release, and then gen' words of release 235
 follow, these gen' words are restrained to the particu- 269
 lar.

Barthol 119 Particular Claim. Thus when A had a judgment
3 Mod 277 Debt agt B B by his Wife gave a Legacy of £ 5
to A. A on receiving the £ 5. gave the £ 5. a receipt stating that B had received £ 5 in full of his
demand of a Legacy and also in full of all other
demands. This was not a release of the judgment Debt

Barthol 119 But when the receipt expressed a particular
debt and received and was not with a particular
claim given words of discharge cannot be thus
restrained. If the receipt is of £ 5 in full of
all demands then all are discharged.

But after the application of this rule the
 Gloke 723 intention of the parties is still doubtful the Court
Stair 140 therefore must generally be taken most strongly
C 107. 289 by agt the grantor or person bound. The reason
Co Litt 197a is that the language being his own he is supposed
D. 167b to have used it in a sense most favorable
to himself and he might have prevented the
ambiguity by using a different language.

But when there is an ambiguity in a promise
made it is to be construed most favorably
Dyer 17 for the party bound. The reason given is that it
3 Gloke 22 is to discharge him from a promise which is odious
C 23 in the eye of the Law. Another reason (which
if true prevents this from being an exception to
the general rule) is that the Court is not signed
by yet proceeds from the obligor, and should therefore
according to the rule be construed most strongly agt him.
And

And upon the same principle if a man in England were bound in a personal bond to pay a ^{Dyer} 170 certain sum at such a feast and then were two ^{Plowd} 297-8 such feasts, in the year he might pay at the last of them. But a Novel Single bond would have been payable at the first.

So if one is bound to make a conveyance sufficient in the opinion of A. if the conveyance in ^{Sho} 23 the manner pointed out by A. he saves the word ^{Parkinson} 775. only tho' the conveyance be not sufficient in point of law. But here a Ct of Equity would undo. wholly such a new conveyance.

To the rule that the construction must be most strong agt. the grantor. there is an exception where such construction would prejudice a third person. Thus when Tenant in ^{Inst} 42 Tail leases for life it will be considered a lease for his own life. But were the life so possessed of an estate in fee the life would hold for his own life, for this is always most beneficial to him. But in the former case the issue in tail might be injured.

Subject to the foregoing rules the words are to be taken in the most comprehensive sense in which they are used. Thus a Covenant ¹⁰² ^{Plowd} 450, made agt. a woman extends to all persons, what ever, whether they are men women or children.

And an indefinite expression is construed as an

an universal one in relation to the Subjects of it
 Point 400.1 unless there is some manifest reason for restrain-
 ing it. Thus if A covenants that he has divers
 houses and makes a bill of Sale of his houses to B
 all he has paid, the two would answer to the word
divers. When legal words are used in a Contract
 they must be understood according to their legal
 acceptation. Thus it has been held that a
 limitation to A and his heirs as long as he pays
 Point 402. Such a sum extends to all the heirs he may
 ever have. Now I doubt the application of
 the rule to this case. The rule itself is un-
 doubtedly correct. For the word here appears to
 me to be used here not as a word of limitation
 but merely as a word of description.

And where one covenants upon request and
 due proof to satisfy all indentments made
 Hob. 217 by a person: by the words due proof legal proof
 is intended. As where a Father put out his son
 as an apprentice with such a covenant in the
 indentment.

Contracts are to be construed according
 to the general intention appearing from the whole
 Dyer 240 Contract or Contract, tho' it be opposed by particular
 Cro Eliz 43. law words. As if the Deftd covenants that he has
 De 615 made no former Grant by which the Deftd might
 be defeated and that the Deftd might enjoy with-
 out hindrance from him or any other person. —
 there.

these last words extend only to any other persons claiming under him. It is also a rule that if the thing stipulated is not done or delivered at the time agreed upon the price at the time the Contract should have been performed is the rule of damages. Mey 406
2d Ban 1010
Dyer 81-2
Ward 317
Reg. J. 221

But if the article to have been delivered has risen in value after the time when the Contract was to have been performed the increased value at the time of trial is the measure of damages. For otherwise the party might suffer from the other's neglect. For he might have sold the article at that time. But if the value diminishes the value at the time the Contract should have been performed is the rule of damages. For he might have disposed of it at the time if he had received it.

If several Deeds or other instruments are made between the same parties at the same time on the same subject they are to be construed as one entire Contract. 2d Ban 518
Ward 410

Annulling, Discharging, and Warring. Contracts

I would in the first place premise that before the terms of the Contract are accepted on both sides it is not consummated, and the party making the offer may retract. 3d Rep. 653
Ward 334
But see

But an offer made on one side and accepted
 Hobart 41 and the other becomes a Contract so that either
 2d Bohn 447. Party by tendering performance may bind the
 other. But there must be at least two efforts
 in to make a Contract.

Thus if A offers to £20 for a horse and B agrees
 2d Bohn 447 to take it there is a Contract and a performance
 2d Bohn 447 or tender of performance by one will bind the
 Hob 41 other. But before the assent of B neither is bound.

1d Bohn 303 So if upon such an offer and the earnest
 7d Bohn 64 is paid on a future time fixed by the parties
 Noy 42 for a performance the Contract is complete and
 2d Bohn 447 the parties are bound.

But if upon the offer being made by one
 Party and accepted by the other nothing more is
 done and the parties separate there is no Contract.

1d Bohn 231 The separation is considered as a waiver of the
 2d Bohn 447 agreement if there is no performance or tender
 2d Bohn 302 of performance no earnest and no time fixed
 1d Bohn 309 for the performance of the Contract. For
 2d Bohn 310 altho the assent forms the Contract yet neither
 1d Bohn 303 has any right to compel a performance by the
 other unless he himself either performs or offers
 to perform.

Suppose then that upon the offer
 the purchaser pays or tenders the money the seller
 is bound. So if the seller performs or offers to
 perform the purchaser is bound. So if earnest
 money is paid the property is changed and either
 has

has a right of action. And so likewise if a time is appointed for the performance the parties are bound. This may need explanation. For if after the offer and accept the parties separate without doing any thing more the Contract is not binding. How does an agreement to perform at a future time alter the case? The reason of the distinction between the cases is that when no time is mentioned for the performance of a Contract the present is considered the time.

But when a future time is fixed then the time of performance has not arrived.

So if A agrees to sell goods to B at a future time, at a certain price provided B agrees with in a certain time to take them and gives him notice, now A is not bound even if B agrees & gives notice within the time. And the reason is that B is not by the terms of the Contract bound and of course A cannot be for both of them must be bound or neither. And if B appears and tenders the money, A is not bound to accept it. For it is not as tender in pursuance of a binding Contract. 35 Rep. 653
Dart 261
page 340,
320,
a contract is
good or bad
at law

I know that such Contracts are generally considered binding, but they are not either on principle or authority.

Having given you the general rules by which you may determine when a Contract is binding, I will now consider how it may be annulled, discharged, or waived.

And.

Com Digest And 1st It is a genl rule that before a right-
 5 Mc. 130 of action has accrued on a simple contract the
 2 J 13 parties may waive by expressing their mutual
 10 Selwin 130 dissent and this may be done by parol
 2 Devins 144 The continuance of the assent of the parties is
 1 Mc 2 259 necessary until one of them has a claim, and
 12 D 538 here neither party has a claim no right of action
 10 Pa 412 having accrued As if I offer B 100 Dollars for his
 house to be paid a week hence when the house is
 to be delivered. Before the expiration of the time they
 sub page 457 meet and rescind the contract by parol
 341.

But on the other hand after the right of
 12 Mc 538 action has accrued a parol agreement will not
 Selwin 130 be a discharge. It can then only be done by
 Broth 384 release which must be by deed In the former
 2 Mc 44 case the parol agreement is not strictly a dis-
 1 D 259 charge for there was no consummate right. It
 was a mere discontinuation of the assent of the par-
 ties before any right had accrued.

It is very true that such a right of action
 may be discharged by a parol agreement executed
 But this comes properly under the title of Accord and
 Satisfaction of which I am now not treating.
 I am now speaking merely of a discharge of a con-
 tract when a right of action has accrued by a parol
 contract itself. There is however one excep-
 tion to the rule which I have been laying down
 Chitt 834 viz the case of a Bill of Exchange. The acceptor

of a bill of Exchange may be discharged by a parol ^{Dough} 235
agreement as well after the bill has become due ²⁹⁷
as before. This is however a positive rule of the ^{Est. 297}
Law Merchant.

But the the Gen Rule is that a parol agree-
ment will not discharge a contract after a right
of action has accrued, yet in Equity the right of ²⁹⁷
action may be considered as waived by a long neg ^{9 Mod 23}
left to claim under the agreement. Thus where ²⁰⁰
there was a contract for the enclosure of Common ¹¹⁰
between the Lord and his tenant, and it was neglected ⁴¹³
for 20 yrs. Chy would not lend it aid to enforce ^{D 414 = 201}
the agreement.

So also where there was an agreement between
the Husband and Wife that she should have the
use of her property to her sole and separate use
and during a long Coverture she permitted the Hus ⁸²
band to have it Chy would not afterwards enforce ^{Skinner 409}
her claim. The presumption was that she had ^{1 Atk 259}
waived it. But in this case it was said that
she might rebut this presumption by
showing that he had enjoyed it agst her will. 2

And so in any case the presumption of waiver
may and ought to be rebutted. For the maxim is
"Statutus in Presumptionibus domus in Contrarium
probat" And a contract consummated and even
executed may be rescinded and that by one of the ^{Cooper 818}
parties only, if there was a provision to that effect ^{Dough 23}
in the contract itself. As if I sell a house to B ^{7th 204}
and

2 East 145 and deliver him. But by the contract C has a
 3 B. & C. 82 right to deliver him on a certain contingency. If
 1 K. & C. 351 upon the happening of that contingency B does deliver
 him A must repay the purchase money. But
 the contract the execution is defeasible, and any de-
 feasible contract may by the terms of it be set
 aside. "Pawd" says that if A contracts with B,

Pawd 418 to set him any thing at such a price as C shall
 D. 416 name the parties cannot annul the contract.

But I cannot persuade myself that this is or
 ever was Law. When the parties refer any thing
 to an arbitrator either party may annul and it
 would be strange if in this case both of them
 could not.

But a contract may be released as
 well after a right of action has accrued as before.

But this release must at Law be by Deed and
 Pawd 418 if the release be a formal express one. But there
 may be a tacit implied release which cannot be
 by Deed. Thus an express release must be written
 signed and sealed. But an implied one may be by
 buying, consulting, or repairing the contract itself.

Again if he for whose benefit the contract
 8 Co. 91.2 is to be performed prevents the performance, the
 Godd. 206 other party is discharged from it. As if A agreed to
 build a house for B. at such a time, and B at
 Godd. 374 that time prevents him from coming onto the
 Pawd 265 land where the house was to be built. A is dischar-
 ged from the performance of his part of the contract.

And in this case the Party prevented from performing his part of the contract is in precisely the same condition as to his right under the Contract as Co. Litt. 210⁶ tho he had performed his part. For otherwise any person who did not like a contract, which he had made might discharge himself by preventing the other Party from performing.

So also if A conveys Land to B with condition that the conveyance shall be void if he pay B 100 Dols. on a certain day and if B is at that time out of the realm so that the money cannot be paid or tendered to him A right in the Land is reserved and he may reenter.

It is not however to be understood that B must hold his Debt. For I think there is no doubt but that Chy. would consider A as trustee of the money to the use of B.

A Contract may also be annulled by a new one of a higher nature for the same thing. The last Contract operates as a merger of the first. So if A owes B 100 Dols. and gives him Dyer 21⁶ a bond or in this State a Note, B can never recover the 100 Dols. or a note on A's book or a promissory note for that money. For he can have but one recovery. And 3 East 251. the Law determines that he shall take it on his highest security. So if A is indebted to B by bond and suit and gets judgment he can never sue again on the bond whether the judgment debt be collected or not.

collected or not. For this being a debt of record may
yet the bond.

Dyer 230.
Paw 423.

Now if the reason of this rule is
asked there are two. One has been already given
that the Party can have but one remedy for the
same cause of action. And the other is that it is
the intention of the parties to afford a higher and
not a twofold remedy. But if A owes 100 Dollars
by simple contract and B gives him one for it, the
creditor may recover either on the bond or the sim-
ple contract. For here there is no merger. The inten-
tion of the parties is to increase not change the security.

1 Burr. 179.
Croft 579.
Croft 517.
D. 817.
Chilley 562.

But this is a contract of a given degree and
go by one of a higher for the same consideration. —
yet this is not the case with one of the same degree.
The only effect of giving a new security of the
same degree is to give the creditor his choice on
which he will take his remedy.

And upon this principle if one indebted by
Note gives a Note for the same sum and for the
same consideration the latter does not at Common
Law merge the former, for they are both simple
contracts. There is however a distinction to be
observed in these contracts of the same degree
when the latter of them is pleaded by way of merger
and when by way of record and Satisfaction.

I cannot now enter fully into the doctrine of
merger and Satisfaction but I will merely observe
that if one who owes another by Note gives him a
new

new one in full satisfaction. of the other this last
will annul the former not by way of merger
but by way of accord and Satisfaction.

But if the lower Contract is merely restrictive
in that of a higher degree when the latter is only
meant to corroborate or enlarge the former the
former is not merged. For this is not the intention
of the parties. Thus if A makes a bailment
to B of goods by Deed. & still an action will lie
on the simple Contract of bailment. So if A is
knowleged by and the receipt of money from B on
account with him the action may still be action
of account. The written Contract is merely
intended as an additional remedy. And if the
action is on the original Simple Contract the Deed
may be given in evidence

A Contract by Deed cannot be dis-
charged or annulled by Parol. For the maxim of
Law is that every obligation must be *diffinitum* &
ligamine quo ligatur and this rule holds as well
before as after the right of action has accrued. —
At Com Law a Deed cannot be discharged by any
unwritten writing.

And it is said that a Contract by Deed
is not annulled by delivering up the Deed to
the party bound if the other party can regain
possession. Now if by this rule is merely meant
that the mere fact that the party comes into pos-
session

Wbat. 19.
Wbat. 118.
Debat. 256.
Geo. Eley 614.
Sho. 44.
Yulton. 102.
Cro. Jac. 254.
2 Willm. 86.
Do. 370.
Lan. 291.
Hol. 1.

Geo. 99.
Wbat. 110.
Palmer 110.

1001th 116.

possession of the Contract does not annul the Contract the rule is undoubtedly correct. For the Obligor of a Bond, may, if he pleases make the obligee his bailor. But I think that if the Bond is delivered up to be cancelled this act annuls the Contract.

And according to the strict rule of Common Law payment on a Bond and Satisfaction is no discharge of a Debt itself. But this amounts to nothing but a new rule of pleading. For such a payment on a bond tho' not a discharge of the bond itself is a good discharge of the money due on the bond, and as such it must be pleaded and not as a discharge of the bond itself.

8 Coke 43-4.

And upon the same principle accord & Satisfaction is not a good plea in discharge of a Covenant broken. But it is good when pleaded as a Satisfaction for the damages incurred by the breach of it.

8 Coke 130.

When the right and the obligation created by a Contract unite in the same person the obligation is at Law discharged. As if the obligor of a Bond is made ex. or don. to the obligee; - here the legal obligation is destroyed. And a person cannot sue himself. But the person who has the equitable right to the Bond may enforce his claim in a Ct of Equity.

1 Day 220.

The

The rule is generally the same if the Obligor
and Obligee intermarry. As if a woman the Ob ^{Rowe 438}
igor or debtor marries the man who is the obligee ^{D° 444}
or creditor the Debt is discharged. For a man cannot
sue his wife.

But this rule tho' generally is not univer-
sal. For if a Bond is made by the parties before
marriage, in contemplation of it, & by the terms ^{Hob. 216}
of it it is not to be performed till after the re- ^{Griff 571}
vocation of the marriage, this is good both at ^{Salk 235}
Law and Equity. Here the right of action is sub ^{224 Reg 515}
sisted during Coverture, yet an action may be ^{54 Rep. 381}
maintained, precisely in conformity with the terms
of the bond. It is remarkable that in the
two first Cases that occurred on this point the ^{Vol. 1 - 117}
two Chief Justices were opposed to this opinion. —
The first was while ⁵¹ Lord "Hobart" presided. The
other during the time of Lord "Holt". They were
both opposed in opinion by all the rest of the Ct.
But during the time of Lord "Mansfield" the
whole Ct. were unanimous.

A Contract may also be discharged by
an act of the Legislature. I do not here re-
fer to an act of Insolvency. But any Law made ^{Salk 478}
after the Contract and rendering its performance ^{8 Mod 51}
illegal, discharges the Contract. Nor is this ^{224 Reg 218}
contrary to that clause of the Constitution of U.S. ^{Vol 1 page 20}
which declares that no act shall be made in-
validating.

impairing the obligation of Contracts. This I have
considered fully, in the title of Municipal Law

How Contracts may be discharged by the act
10 Mod 368, of God, or any inevitable accident which renders
16 Co 98 the performance impossible. As if the Lessee
covenants to leave standing the timber trees, and
they are blown down. This is not a breach of his
covenant.

As if A bailes B's house upon a
Palmer 548 covenant to return him at a particular time
16 Mod 447-8 and before that time the House dies of disease.
B's covenant is discharged.

Again A contracts to sell to B for one year
at a certain price to be paid by half yearly in-
16 Mod 448, stallments. After the expiration of the first half-
year B dies. His Ex^{or} is not bound to pay A
for that part of the second half year which he
has served B. B's death prevents the perform-
ance of the Contract and discharges the parties.

There is a case in the "Barrow" which
may at first seem to contradict this rule.
A the Capt. of a Ship covenanted to be at Win-
3 B 1637 yaw, a port in South America at such a time
Vol 3. 99, to receive the loading of B. He was prevented
reaching there at the time by stress of weather.
But it was held that this did not excuse his
breach of Covenant. Now in this case you will
remark that the Capt. must from the nature
of the Case, have taken the risk of arriving
and

on himself And in the case under the rule which I have given the Covenant was merely made up as a Covenant for good behaviour on the part of the Covenantor.

But a Contract becoming only partially impossible to be performed must be so far performed as the case will admit of, if the other party cannot or performs it. Thus there is a Bishop leased for more than 21 years which was ago. the Stat. the Lease was held good for that time. So if a man agrees to convey a certain piece of Land at a certain time and before that time part of the Land is swallowed up, he must convey what is left. Flower 284
Powell 448

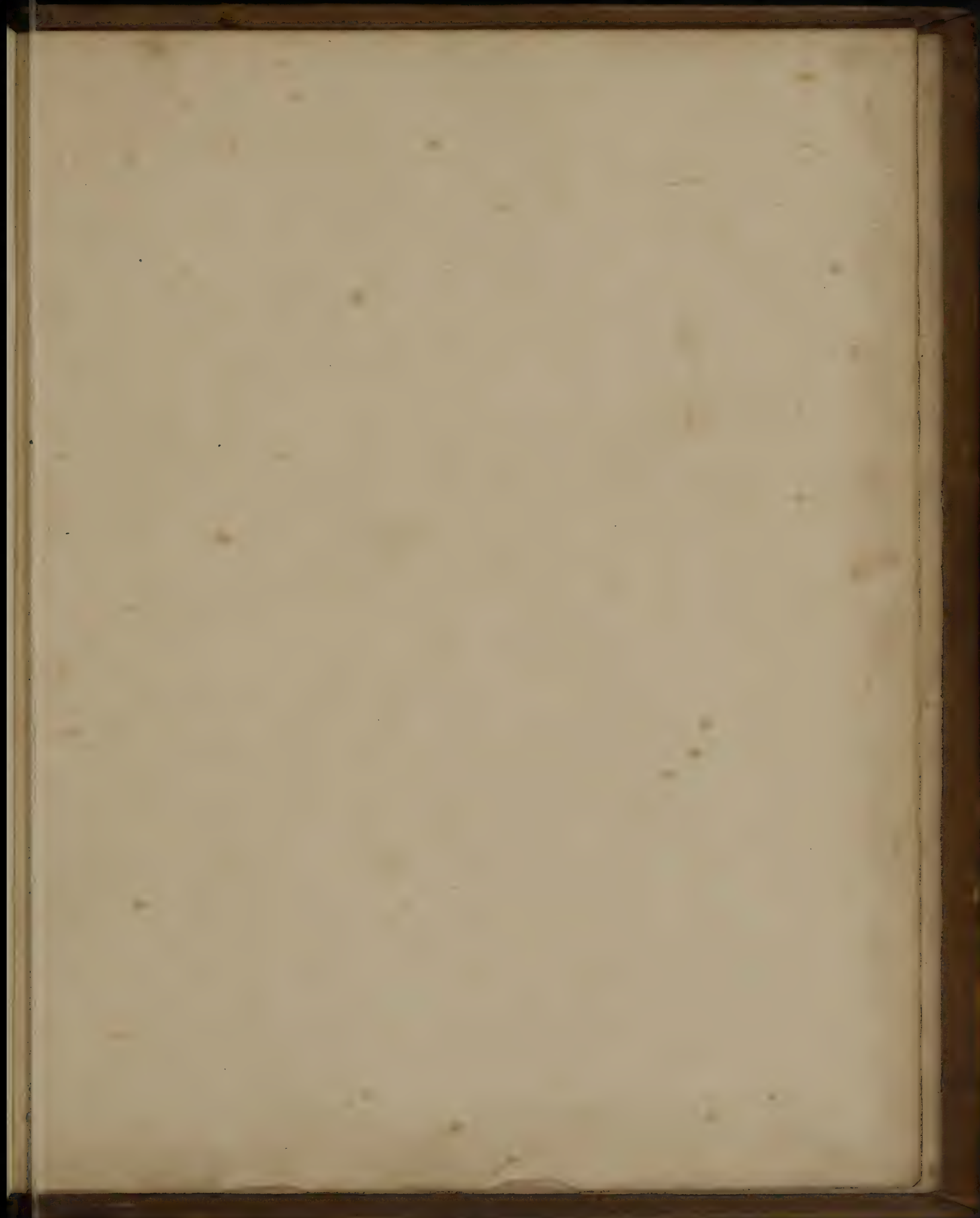
So if one agrees to convey Land and before the time of conveyance dies, if the agreement was by bond the specialty is saved. But Equity will compel a conveyance by the Heir. Eq. 16 18.

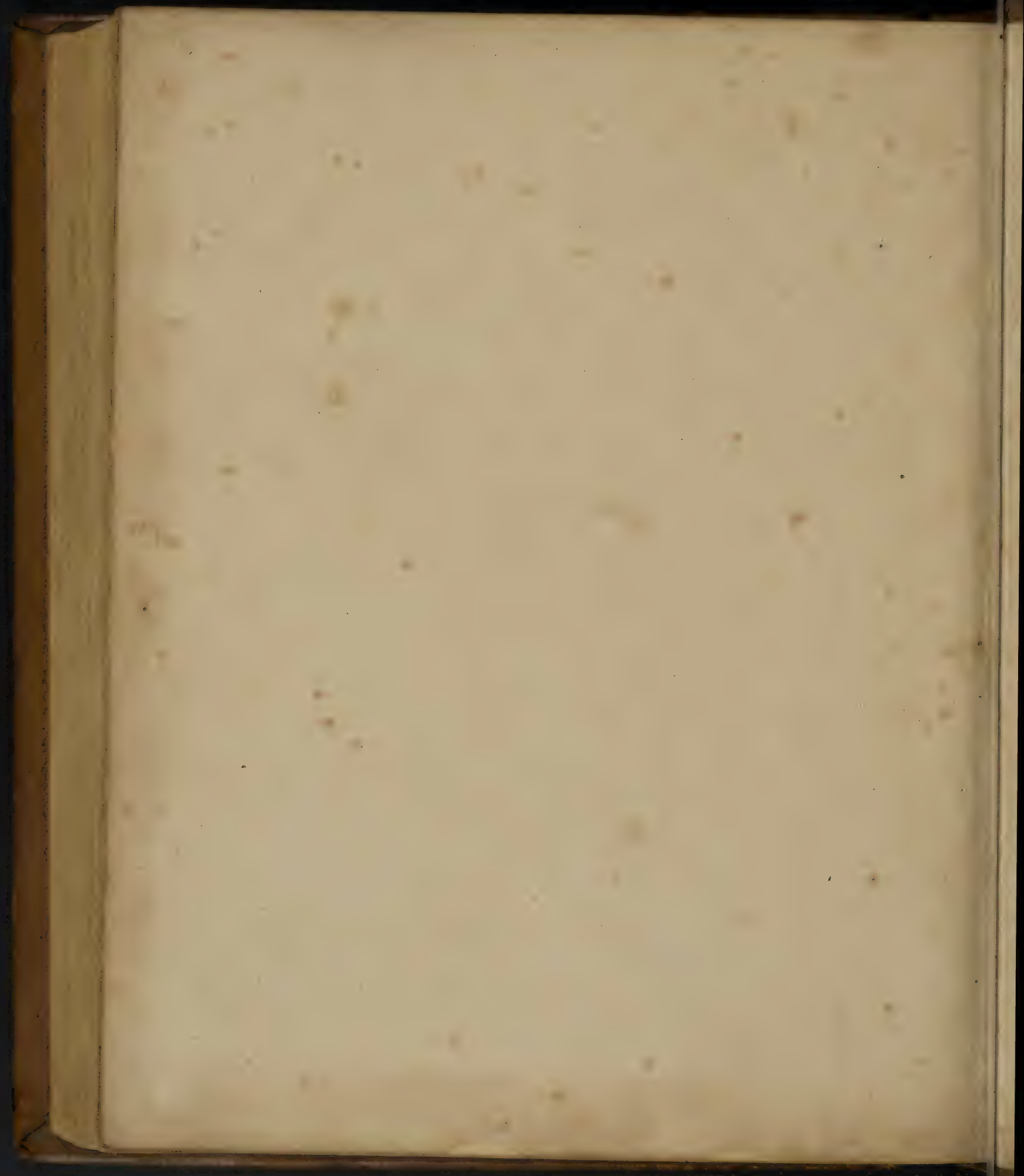
But the act of a third person cannot regularly vary or annul a Contract. Thus if A gives a bond conditioned that B shall appear on eight days notice and if he does not then he will answer the demand. Now if B appears up on 5 days notice it is discharged from his bond. Powell 451

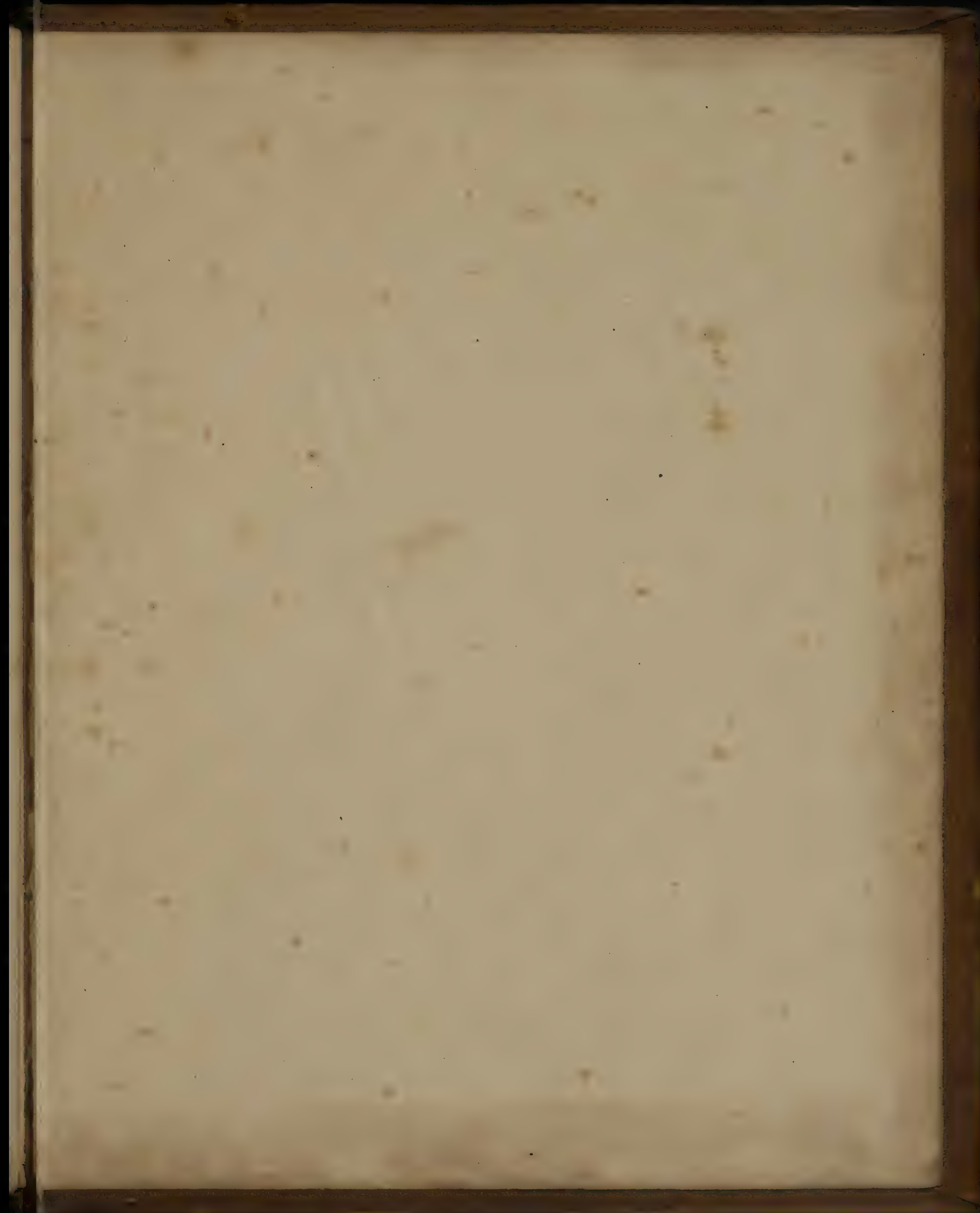
When however the act of a third person is by the terms of the Contract to vary or give effect to it such act will do it. As if A contracts to give for a certain thing a price which B shall fix, after B fixes the price it is bound, and if B will fix no price the Contract is discharged. Powell 415
416

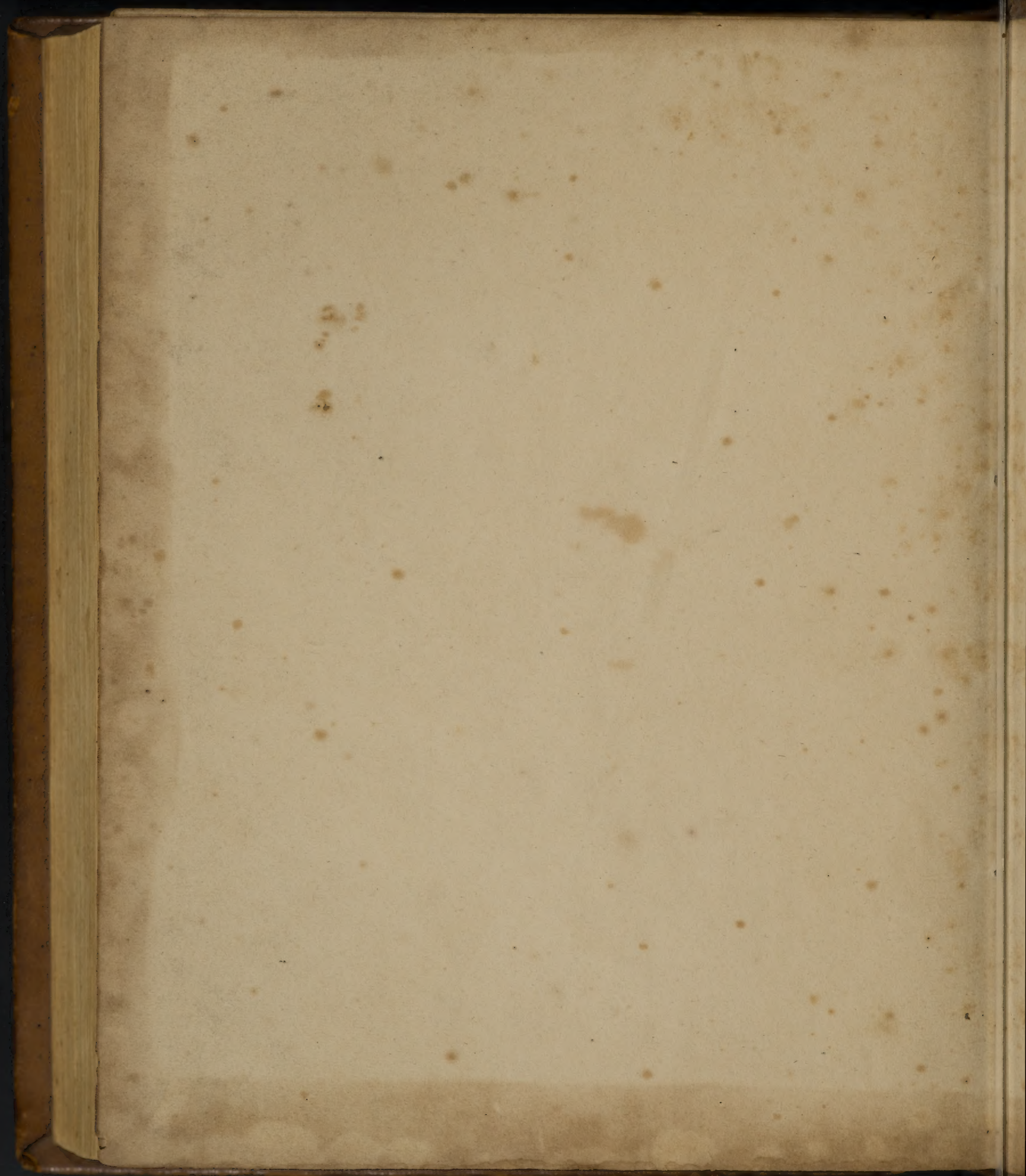
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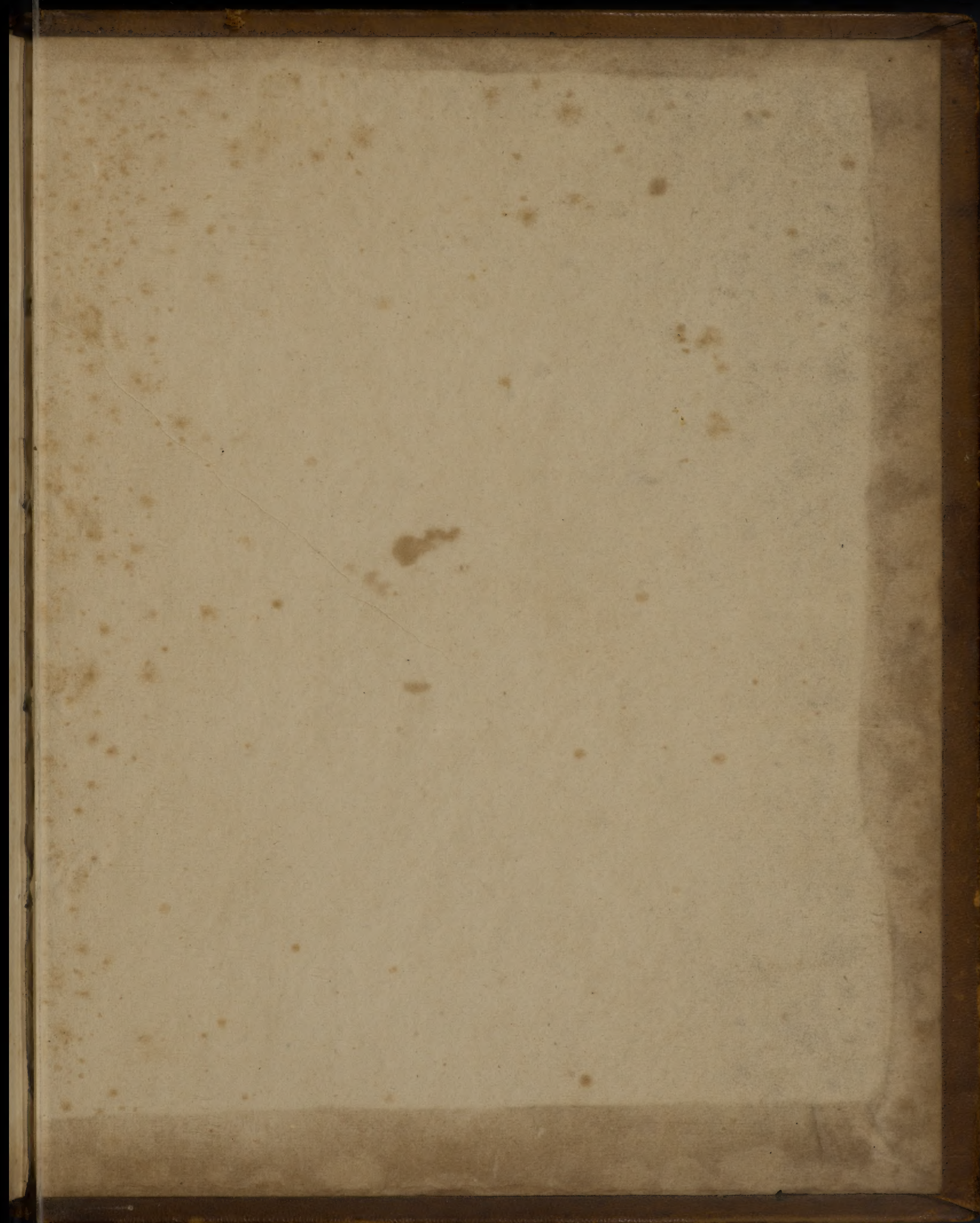
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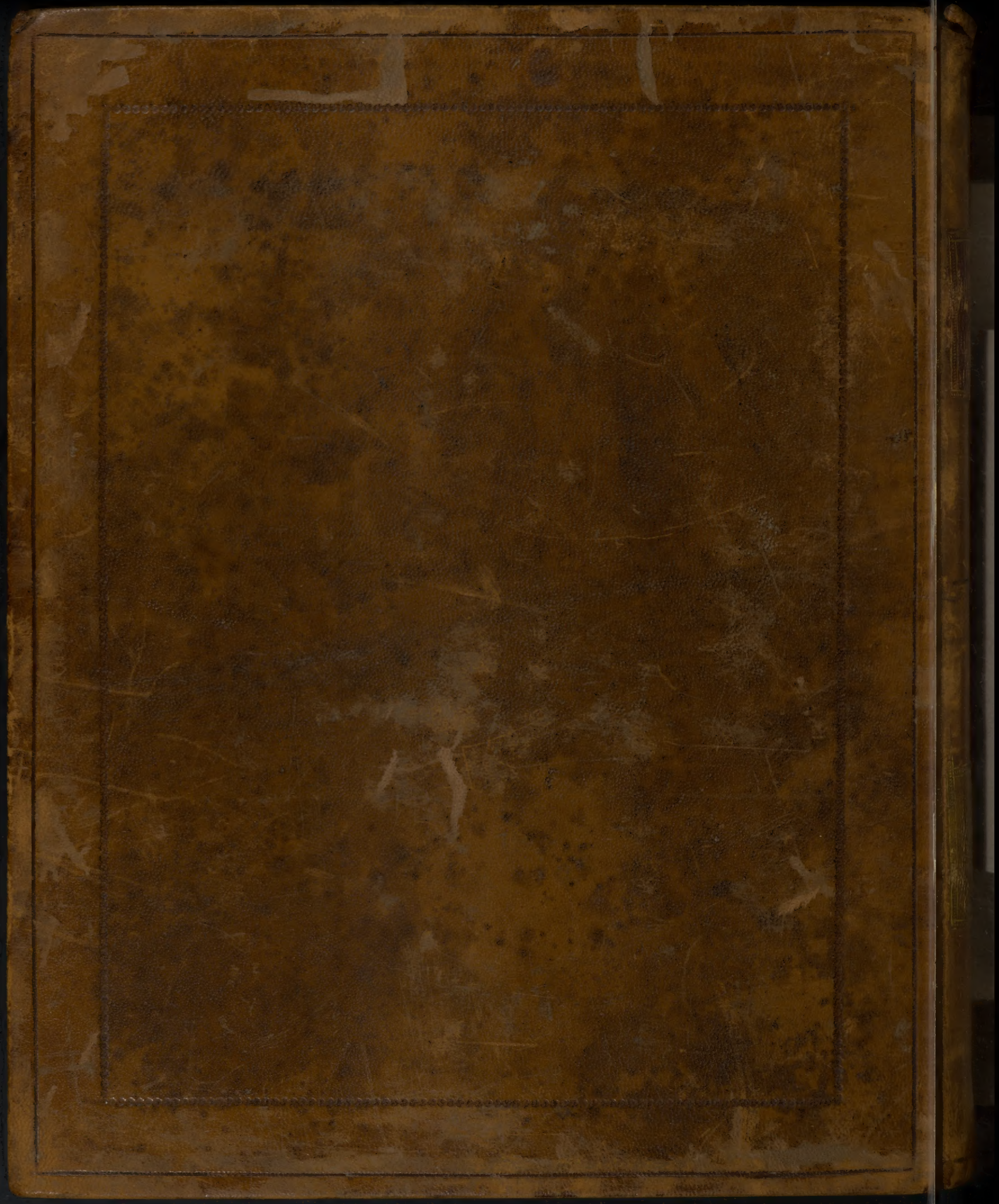












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